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THE EXTENSION OF LAW TEACHING AT OXFORD.[1]

SIR, — The Rhodes Scholarships have conferred many benefits on Oxford. They have brought to us a body of men who form a new and good element in our university life. The presence of the Rhodes Scholars (and this is one of the points upon which I wish to dwell in this letter) has done a great deal already, and may do much more hereafter, to give new life to the study of law at Oxford. For the Rhodes Scholars, whether they come from the United States, or from our English Colonies, such as the Canadian Dominion or the Commonwealth of Australia, are likely to study law and to study it with great effect. They are men on the average a little older than most of our undergraduates at the date of their matriculation. They have already seen something of life; they have many of them before coming to England studied law under distinguished teachers, for example, the Harvard Law Professors, or the Professors of Columbia University. They are men — and this is a great point — who have been accustomed to consider the learning of English law the proper subject of post-graduate study.

In these respects they occupy a different position from their English fellow-students. Not one Englishman in a thousand who matric-

[1] *A Letter to the* HARVARD LAW REVIEW.

For the interest of readers we reprint the following from the "Times," May 12, 1910:

"The electors to the Lectureship in Private International Law have to-day elected Mr. Albert Venn Dicey, B. C. L., honorary D. C. L., Fellow of All Souls. All Souls College has undertaken to provide a stipend for this new lectureship. The lecturer is required to lecture and to receive students desirous of informal instruction in international law. Dr. Dicey, it will be remembered, last year resigned the Vinerian Professorship of English Law, and is now Emeritus Professor." — ED.

ulates at Oxford has studied the law of England. The teaching of the law school at Oxford has indeed already told on the study of law in England. Of the young men who have left us many have already made a brilliant success at the English Bar; of these some, at any rate, have learned the elements of law at Oxford. Not a few have perceived that to go through the examination necessary for the attainment of the B. C. L. degree well repays the work needed for going through it with success. It gives one of the best law degrees to be acquired in the United Kingdom. A first or even a second class in this examination is a guarantee that the student knows more of the principles both of English and of Roman Law than ninety-nine out of every hundred young men when about to be called to the Bar. A man who reads for the B. C. L. degree is, moreover, provided with as good, as sensible, and as thorough-going a scheme of legal study as any person can desire who is seriously bent on reading law with a view to future practice. Hence the renovation of the examination for the B. C. L. degree, due originally, I ought to add, to the energy and perseverance of my friend, Mr. Bryce, our present Ambassador at Washington, and my friend Professor Holland, who year by year adds reputation to the Chair of International Law, attracting a small but very remarkable body of students who are bent upon the acquisition of general legal knowledge and on combining practical knowledge of the law of England with the study of the principles of the law of Rome.

But at this point there comes another most serious difference between the Englishmen and the Rhodes Scholars who desire to take the B. C. L. degree, and thus go through what with Englishmen and with the Rhodes Scholars is really a course of post-graduate study. Unfortunately for the University, Englishmen reading for the B. C. L. degree study law but do not, for the most part, study it at Oxford. They wish to be called to the Bar. They go to London to read in Chambers. The knowledge to be acquired there is to them indispensable. They read for the B. C. L. degree, but they read in London.

The position of a Rhodes Scholar who aims at a B. C. L. degree is different. He is from the time of his arrival here engaged in effect in post-graduate study. He has obtained a degree in Arts in some other University. If he has already studied law, for example, at Harvard, he is already accustomed to consider the post-graduate study of law

as the natural thing. If he has enjoyed the inestimable advantage of training in your Law School, he starts with every chance of success in the B. C. L. examination. He can, if he likes, pursue this object from the very commencement of his career at Oxford. Just because he is a Rhodes Scholar, it is in Oxford during Term time that he must study. Rhodes Scholars will, if I may venture to say so, find in reading for the B. C. L. degree the best possible supplement to that admirable catechetical teaching which connected, as it is, especially with Harvard, has, I am told, spread to the law schools of many other American universities.

For this system I have always entertained and expressed the greatest admiration. Your distinguished professors wisely fix the attention of their pupils on reported cases and the inferences to be drawn therefrom. This brings young men into touch with reality. But to an English teacher it would seem, if I may venture to play the part of the friendly critic, that to this invaluable foundation there ought to be added a wider knowledge of the law of Rome than, unless I am mistaken, is given in the celebrated law schools of America, and also an acquaintance, which can hardly be obtained from cases alone, with the principles to be gathered from the works of the best among the legal writers of England and of America. The now ever growing mass of good legal literature must be studied as no small part of the English world of letters. Whilst I earnestly wish that the catechetical teaching of law may be more and more cultivated at Oxford, I still hold that the consecutive lectures there delivered are admirably suited for the literary and logical exposition of legal principles.

Let me now turn to the advantages, some of them new, offered by Oxford to the students who we hope will flock to us from the Colonies of England and the States of the American Commonwealth at the end of the next long vacation. Great and systematic efforts, fostered with great liberality by the College of All Souls, have been made for years to extend the field and to improve the substance of our teaching, not only in law, but in subjects connected with legal studies. We have for years happily possessed teachers of International Law and of Roman Law of high and universally acknowledged reputation. Of the way in which the Professorship of English Law has been filled I am hardly the person to form or give an opinion. The Vinerian Professor who in 1909 resigned his chair after a tenure

of office of some twenty-seven years, has been succeeded by a man who, after obtaining the most varied of University honours, has practised law with success in London, and exchanged, whilst still a young man, a very promising career as a Chancery lawyer for the post of a teacher of law at Oxford. It is quite certain that no lawyer of greater eminence or excellence has ever occupied the Vinerian Chair.

But in this paper I am concerned far less with the merits of the Oxford Faculty of Law, as it has existed, or now exists, than with the recent efforts made to extend our sphere of legal teaching. I will emphasise two of them; because the lectureships or readerships which I am about to describe have in my judgment a special interest for American students. There has been created, almost the other day, a Lectureship on Political Theory and Institutions. The name is too vague — though perhaps the indefiniteness of the name is not without its advantage — to convey a very fixed meaning to your readers. Mr. William George Stewart Adams, the elected Lecturer, is, one may venture to assert, as well acquainted with the law and the practice of what one may call administration, as any man who could have been appointed. He has lectured with success as Professor at Manchester. He has taught and learnt much in the Universities of the United States. He has been, so to speak, the right-hand man of Sir Horace Plunkett in his patriotic and successful labours to revive and improve the industries of Ireland. Mr. Adams is a teacher from whom we may expect much. In none of the many places he has occupied has he disappointed those who relied on his energy and talent.

All Souls has also created a Lectureship in Private International Law (Conflict of Laws). My studies have interested me much in the subject, and it is impossible I should not feel every wish that this branch of law should receive more attention than has hitherto been devoted to it in Oxford. The reason why it has been but slightly studied by undergraduates is that it is only in the B. C. L. examination that the subject of the Conflict of Laws may be taken up by the candidate for a degree. No man can for the moment expect that a very large class can be collected together for the study of a subject which, to those acquainted with it, presents special fascinations. Yet I am inclined to think that it ought to, and when its nature is well understood will, draw to it a definite body of American students.

They are in the first place, well trained in the subject by teachers such as Professor Beale. The whole topic, again, of Private International Law is becoming year by year of more and more importance in England; and I cannot but suppose both from the nature of things, and from American law reports no less than from American treatises, that among the forty-eight States of the Union questions about the conflict of laws must have an exceptional and a living interest. To these considerations may be added one other. Among the best-known of the authors, who since the beginning of the nineteenth century have occupied themselves with this province of law, stand Story and Savigny. Each may be considered the immediate ancestor of two different schools each of which has produced many and distinguished disciples. At the head of the Anglo-Saxon school assuredly still stands Story. At the head of what I may call the Continental School of writers on Private International Law, as indubitably, in my judgment, still stands Savigny. There is nothing more remarkable than the difference between the way in which all or nearly all English and American authorities regard the conflict of laws, and the way in which the same topic is under the name of Private International Law regarded by German, French, and Italian teachers, in short, by all the members of the Continental school who speak with the highest authority. To appreciate the existence and to understand the nature of this difference is a matter of no small difficulty, and well deserves, as it will repay, the labour both of teachers and of students. Add to this that the attempt to compare the English with the Continental method of dealing with the problems of international law may, I conceive, form a good introduction to some comparison between the law of the English people on both sides of the Atlantic and the law which prevails throughout the more important states of the continent of Europe. Of a subject which has always deeply interested me I have said much. The fact that since I began writing this letter I have myself been appointed Lecturer in Private International Law permits me to say this, and this only. The Lecturer will certainly make an attempt to study with his pupils the various sides of a subject to which as a writer on the Conflict of Laws he has for years devoted attention.

A. V. Dicey.

All Souls College, Oxford.

THE ENGLISH COMMON LAW IN THE UNITED STATES.

THERE has been some debate recently regarding the law that is taught in our American law schools,[1] and the suggestion has been made that the time has now arrived when the emphasis should be placed upon the local law — the law of a particular jurisdiction, like Illinois — rather than upon a so-called general law, which, it has been assumed, is or ought to be the same in all the states where the common law is supposed to prevail. Without contributing directly to this discussion, it has seemed to the writer that a better understanding of the problem of the law in this country, and of the meaning of the terms "local" and "general" law, would be obtained if some attempt were first made to ascertain what is meant by the common law which has been adopted in some form by most of the states in this country. Did the adoption of the common law of England mean the adoption of a complete system or general body of law, which should have the effect, if properly administered, of making the decisions of the courts of the different states uniform; or did its adoption mean primarily that, by reason of the force and effect given by the common law of England to decided cases, there should develop in each separate state, as in England, a more or less scientific system of law which, of necessity, must, in each state, become in time a separate and distinct body of law? Which of these views, as to the effect of the adoption of the common law, is the accepted one, or is it true that, disregarding the fact that the two views necessarily involve more or less inconsistent ideas of what is meant by the law, the courts in this country have been, and still are, attempting to make both views prevail and work in harmony? These questions are worth consideration in any attempt to determine the meaning and nature of the common law in this country.

For some reason the writings of Bentham and Austin upon the nature of the common law have never had any great influence in

[1] Vol. xxxi, Reports of American Bar Association, 1012–1027, 1091–1119, and vol. xxxiii, 780 and 919.

this country, certainly not with the courts. And yet no better opportunity, perhaps, could have been offered for testing conflicting theories of the nature of the common law of England than the adoption of that law as a rule for the government of courts in jurisdictions different from that of England. The earlier generations of lawyers in the United States were taught law by Blackstone, and his view that the courts only discover or declare a preëxisting law was generally accepted in this country, not only by writers on the law, such as Kent, but by the courts and the lawyers. It was, perhaps, of no great practical consequence, so far as English law was concerned, if Blackstone and the English judges preferred to say that the courts did not make the law, but only declared it, so long as it was always understood that the common law of England on any subject was never different from the law as settled by decided cases. But when the question concerned the effect of the adoption of the common law of England as a controlling source of law *in another jurisdiction*, it obviously made some difference whether English decisions were thereby made as controlling and binding upon the courts of that other jurisdiction as the decisions of its own courts, or whether English decisions were only made some evidence of the common law, and the courts of the other jurisdiction were in fact given perfect freedom to determine for themselves what the English common law was or ought to be, at the same time that their own decisions, according to the rule of the English common law, became binding upon them in the decision of subsequent cases. In the one case the common law of England is identified with the decisions of the English courts; in the other it is treated as something existing apart from the decisions of the English courts, which all courts subject to the rule of the common law are engaged independently in discovering and declaring, though in regard to which their discoveries and declarations should be the same. Which of these views is the prevailing one in this country?

I.

It is generally assumed, even outside of our law schools, that in those states in which the English common law has been adopted, the decisions of the courts should, upon most questions, in the

absence of modifying statutes, be the same. This general assumption is illustrated by the presumption which is indulged in by the courts of one common-law state in regard to the law of another such state.[2] If, for instance, in a case pending in a court in Illinois, it becomes material to know the law of New York, the Illinois court, in the absence of direct evidence, will presume that the common law as found and declared by the courts of Illinois is the law of New York also, on the theory that, as both courts declare or interpret the same common law, they should arrive at the same result. This means, of course, that the decisions of the courts of Illinois are regarded not only as determining the law of Illinois, but as correctly declaring the common law adopted in the different states. The law of Illinois and the common law are regarded by the courts of Illinois as identical, and the courts of all the other states which derive their law from the common law of England regard their own decisions in the same light. But, while each state regards its own decisions as correct declarations of the common law, which ought to be followed in all common-law states unless modified by statute, it admits that the decisions of other state courts, even when different from its own, do in fact determine the law of those states, whether such law be the true common law or not. The settled decisions of the highest courts in each of the states are accepted in other state courts as conclusive evidence of the law in each of those states.

Similarly, the United States courts, upon certain questions of so-called general law, not yet completely defined, assume the existence of a uniform law which should be declared in the same way by the courts of all of the states. But even this general law, which is regarded as so obviously the same everywhere, is not in fact always discovered and declared in the same way by all the courts. This is recognized by the federal courts, but instead, on that account, of following the different decisions of the state courts in which they sit, the federal courts assume the right to exercise an independent judgment in declaring this general law, so that there may be uniformity of decision on such questions in all the federal courts at least.[3] The federal courts sometimes speak of

[2] See "Presumption of the Foreign Law," by Albert Martin Kales, 19 HARV. L. REV. 401.

[3] Myrick v. Michigan Central R. R., 107 U. S. 102, 109–110.

this law which they declare independently as a general law, and sometimes as the common law, or as based upon common-law principles, but if there is a general law which is still more general than the common law, at any rate it is not regarded by the federal courts as different in its principles from the common law.[4] It is a law which is assumed to prevail at least in all of the states which have adopted the common law of England.

The federal courts, in cases in which they have jurisdiction, like the different state courts, exercise this power of declaring the common law for the purpose of determining the law of the states. The federal courts, like the state courts, assume that the general law and the law of the states is identical, and they assume also that their decisions not only correctly declare the common law, but the law of all the states as well. Unlike the attitude of the different state courts toward one another, however, the federal courts do not always accept the decisions of the state courts on these questions of general law, when different from their own decisions, as conclusive determinations of the law of the states. And as each court, federal and state, applies the common-law doctrine of *stare decisis* to its own decisions, the result is that contracts and other acts subject to the "general" law may be in fact governed at one and the same time by two conflicting laws, — the law as declared by the state court and a different law declared by the federal court.[5]

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[4] In the famous Baugh case, 149 U. S. 368, the court refused to follow the decisions of the court of Ohio on the fellow-servant question, — a question of "general law," — but decided it for itself as a question which "rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law.'"

[5] It has not yet been determined, so far as the writer knows, whether parties may provide that their contract shall be governed by the law of the federal courts, but the law of the place of a contract is usually regarded as determined by the decisions of the state courts.

Suppose a "general-law" contract is made after a decision of the state court, on common-law principles, declaring the rights and obligations of parties to such contracts. Suppose the federal court, exercising an independent judgment in a similar case, disagrees with the state court, and then suppose the contract in question comes before the state court and that court overrules its former decision and follows the decision of the federal court. Would such a change of decision by the state court be held to deprive the parties of their constitutional rights under the doctrine laid down in Muhlker *v.* N. Y. & H. R. R. Co., 197 U. S. 544? Or is the rule of that case inapplicable to cases which fall within the "general" law, and have parties no right to rely upon the principle of *stare decisis* in such cases?

The result of this doctrine of the federal courts is a striking illustration of the difficulties which follow from an attempt to apply at one and the same time, in the same territory, the common-law doctrine of the authority of precedent — the identification of the law of a particular jurisdiction with the decisions of its courts — and the view that the decisions of the courts are only evidence of the law, which other courts, if given the opportunity, may declare differently. In cases of "general" law, the federal courts consider it of more importance that the true general or common law should be declared as the law of the states by the federal courts at least, even at the sacrifice of the common-law principle of singleness of the law within a given territory; while in those cases where the decisions of the state courts have settled a rule of property, the federal courts deem it better to forego their assumed constitutional duty to declare independently the true common law, for the sake of preserving within each state the common-law principle of the authority of precedent and singleness in the law.[6]

The question which it is now necessary to consider is whether this common or general law, which is assumed to be the same in all states, is identical with the common law of England adopted

[6] See the latest case in the Supreme Court of the United States on this subject, Kuhn *v.* Fairmont Coal Co., 215 U. S. 349, where the right of the federal court to decide for itself a question relating to real property was sustained, the cause of action having accrued prior to any decision by the state court on the subject, though such a decision was rendered by the state court before the federal case was decided.

Suppose that after the decision of the case by the West Virginia court, but before the case was decided differently by the federal court, parties in West Virginia had entered into a contract similar to that passed upon. If that contract later came before the West Virginia court and that court changed its mind, and, instead of following its prior decision, followed the decision of the federal court, would the doctrine of the Muhlker case, 197 U. S. 544, be applied on writ of error from the United States Supreme Court to the state court? Probably it would. But this only shows that the federal court does not declare the law of the state in the common-law sense; its power in such respects is not in fact coördinate with the jurisdiction of the state court. Even on questions of general law it is the decisions of the state courts which in fact determine the law of the state; the federal courts, while purporting to declare the law of the state, are in fact making the law of the federal courts.

Take another example. Suppose a case similar to Gelpcke *v.* Dubuque had come up in the federal court before any decision on the question in the state court. Suppose, after the decision by the federal court, a similar case came up in the state court on a contract made after the decision by the federal court, and the state court disagreed with the federal court. Would the Supreme Court of the United States, on writ of error to the state court, hold that the decision of the state court deprived the parties of their constitutional rights?

by the different states, in many cases by statute, or whether the adopted common law of England is something different from this general common law.

The Supreme Court of the United States has in several instances [7] put the precise question, "What is the common law?" and has uniformly answered it in these words quoted from Kent's Commentaries: [8]

> "The common law includes those principles, usages, and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature."

Such a definition [9] does not materially advance our present inquiry, and merely suggests in another form the question: Did the adoption of the common law of England have the effect merely to confer upon the courts of each state the power to decide for themselves, in the absence of statute, what are the "principles, usages, and rules of action applicable to the government and security of persons and property," regardless of previous decisions by the courts of England or of any other jurisdiction? If so, and if the statement and application of these principles by the courts of each state become binding as authorities only upon the courts of that state, then obviously the result in time can only be a different body of law in each state. If, on the other hand, it is assumed that there is only one consistent and true set of "principles, usages, and rules of action applicable to the government and security of persons and property," that this one set of principles constitutes the common law as it really is, and the decisions of all the courts are only evidence of what this real common law is, then obviously the search for this true common law ought always to be maintained by the courts of every common-law jurisdiction. No principle of *stare decisis* should be applied by state or federal

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[7] Western Union Tel. Co. *v.* Call Publishing Co., 181 U. S. 92, 101; Kansas *v.* Colorado, 206 U. S. 46.

[8] Vol. i, page 471.

[9] It may be doubted if this definition is any more helpful than the statement of the chancellor in the case of Marks *v.* Morris, 4 Henning & Munford 463: "It was the *common law* we adopted, and not English decisions; and we should take the standard of that law, namely, that we should live honestly, should hurt nobody, and should render to every one his due, for our judicial guide."

courts until the true common law is discovered and everywhere accepted.

We shall find many state courts repeating the statement that it was the English common law that was adopted and not the decisions of English courts, but, as already pointed out, no court in fact treats its *own* decisions as merely evidence of what the common law is. Each court proceeds upon the assumption that it has discovered the real common law, and regards its own decisions as determining the law for that jurisdiction at least, and as controlling in subsequent cases, regardless of any suggestions as to what the common law really is or ought to be. Even if we assume, therefore, that the adoption of the common law of England means the adoption of a single system — one uniform and consistent set of "principles, usages, and rules of action applicable to the government and security of persons and property" — we are yet forced to recognize that each one of the separate states has adopted the common-law principle of the authority of precedent, and acts on the theory that what its courts decide is the real common law governing each question passed upon. No court treats its own decisions as subject to be disregarded as readily as the decisions of the courts of another jurisdiction, on the ground that they do not represent the true adopted common law. If it did, it would not be following the practice of the English courts, and the method of developing and defining the law would be essentially different from that recognized by the English common law. Such an adopted common law would be the English common law with its most distinctive feature left out, — the feature which identifies the law with the rules enforced by the courts.

In short, the acceptance and application of the common-law principle of the authority of precedent in a given jurisdiction eats up and destroys the theory that the decisions of the court are only evidence of the law. The two principles are entirely inconsistent; if you accept one you cannot have the other. Bentham and Blackstone will not work together. But what becomes, then, of the adopted common law of England in this country? What is *that* common law?

In the recent case of Kansas *v.* Colorado,[10] the United States

[10] 206 U. S. 46.

Supreme Court, after quoting the passage from Kent already referred to, goes on:

"As it [the common law] does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of the courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. *For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes.*"

This is a sufficient identification of the common law with the decisions of the courts, and if the first declaration of a principle by any common-law court were followed by all other common-law courts everywhere, or if there were a final court of appeal for all jurisdictions in which the common law is the rule of decision, no further difficulty, perhaps, would be experienced in determining what the common law is. But state courts in declaring the common law do not always follow a prior decision in England or in another state, and the federal courts do not always follow the prior decisions of the state courts whose common law they purport to declare. The result is that there are a great many independent jurisdictions in this country alone, in which the courts are all supposedly engaged in declaring the common law, and there is no final court of appeal to determine what this common law really is. Most of these jurisdictions have expressly adopted the common law of England, but there is great uncertainty as to what this English common law thus adopted is.

If we adopt the language of the United States Supreme Court last quoted, which identifies the common law with the decisions of the courts, it should follow, if the authority of precedent within a single jurisdiction is recognized, that the *English* common law is "but the accumulated expressions" of the *English* courts "in their efforts to ascertain what is right and just between individuals in respect to private disputes." No courts other than English courts can determine definitely and finally what the law of England is, and the common law of England on any subject cannot possibly be something different from the final and settled determinations of the highest court in England. The common law of England is what the English courts make it. The courts

of New York and Illinois may express an opinion as to the common law of England, but they cannot by any possibility *make* the law of England as the English courts in fact make it, any more than the courts of New York can settle the law of Illinois, or the federal courts, which are in fact courts of another jurisdiction, can make the law of the states in which they sit.

Any other jurisdiction, therefore, which should now adopt the English common law as it is to-day must at least adopt those principles which are now established as the law of England by the decisions of the English courts. There is no English common law which is different from the final decisions of the English courts. To talk, therefore, about adopting the English common law without adopting the decisions of the English courts is to talk about adopting something which does not exist; it is an attempt to adopt the common law, as already stated, with the essential and significant feature of the English common law left out, — the feature which identifies the English common law with the decisions of the English courts. Yet that is what many of our states have attempted to do, and what the federal courts regard all of them alike as having in fact done. The theory is, as it is often expressed, that the "whole body" of the English common law was adopted, without thereby making any English decisions at any period of time controlling authorities in the states. On the other hand, in other states, while it is admitted that English decisions of some period of time are binding upon the state courts, it is not agreed what the period is in which the decisions rendered by English courts should be regarded as controlling, and, as a matter of fact, in most instances the courts in this country treat all English decisions of all periods as of the same consequence, to be followed or not as may be seen fit in each particular case.

Whether we speak of previous decisions in a given jurisdiction, which, under the rule of *stare decisis*, are absolutely binding in subsequent cases, as constituting the law itself, or only as authoritative sources of the law, is of no great consequence. The two statements, properly understood, mean the same thing. But it is important to distinguish such binding decisions from the decisions of the courts of other jurisdictions, which, though they may be sources of law in the sense of furnishing assistance in the matter of reasoning upon the principles involved in a case, are not binding

or controlling sources of law in the decision of subsequent cases in other jurisdictions. In all serious litigation, where the questions involved are never absolutely settled, it is necessary to draw upon all the sources of legitimate legal argument. Opinions rendered in decided cases bearing upon the matter in hand are better sources of law, usually, than expressions of opinion in any other form. Opinions in such decided cases from other jurisdictions, when based on general principles, or on general sources of law common to all courts, will always be persuasive and especially valuable for purposes of argument;[11] *but not because they constitute any part of the adopted common law of England.* That is the point to remember. Decisions of New York courts, for instance, do not represent, in Illinois, any part of the common law of England adopted by the Illinois statute, which provides that the common law of England, so far as applicable, shall be the rule of decision until changed by statute. The English common law thus adopted by statute in Illinois is not necessarily the law of all the states, or a general law which all the states of the Union are constantly pursuing and discovering, much less developing. No doubt the law grows, but not the adopted common law of England which is to remain unaltered until changed by statute. The failure to distinguish between the adopted and binding common law of England, and those general sources of law and right methods of reasoning which may properly be regarded as of the same force and validity in all the states, has been the cause of much of the confusion regarding the meaning of the common law.

From the historical point of view, also, difficulties have existed. No doubt the common law brought to this country by our English ancestors who settled the first colonies in America did not, as a matter of historical fact, consist of all the decisions of English courts rendered prior to such settlements. Our ancestors knew

[11] No one, therefore, who is to engage actively in the practice of the law anywhere in this country can safely confine his knowledge of the law to the cases of a particular jurisdiction, and it may well be argued that the law schools should aim to fit the lawyer, not to know merely the settled law of any one jurisdiction, but to know the general sources of law and methods of reasoning which will enable him to deal with the unsettled problems. At the same time, if he is to be properly trained in common-law methods of making law, he must know in particular the force and effect to be given in each jurisdiction to the decisions of the courts of that jurisdiction. As a practicing lawyer it will always be with what the courts of some particular jurisdiction will decide that he will be concerned.

little enough about such decisions, and, as a matter of fact, in some of the colonies the law of God was preferred to the common law. The appeal to the protection of the common law by the colonists was not, for the most part, an appeal to the decisions of English courts in matters of private rights, but in matters affecting the personal liberty and political privileges of the citizens.[12] It was a long time before English decisions were known and referred to by the courts in this country in the decision of litigated matters between private parties. After the Revolution and the creation of the states, when settled courts conducted and presided over by lawyers became established, English decisions were generally accepted as authoritative. Whether the adoption by the states of the common law of England meant that English decisions prior to the first colonial settlements were binding upon the state courts, and those after that time were not, was a matter little discussed. As Mr. Gray has said,[13] the decisions of English courts after the settlement of the colonies and before the Revolution had as great and direct an influence, as a matter of fact, upon the decisions of the courts of this country as if they had been considered binding authorities. For a long time the English cases were the only cases to which any reference could be made. It was the practice of the courts then, as it is still, to declare that such and such a rule was the rule of the common law, and refer as authority to English cases, without reference to the date of the decisions relied on. The prejudice which existed for a time in this country against English decisions rendered after the Revolution was not, in particular, a prejudice on the part of the courts. But when, for any reason, the courts did not wish to accept the rules laid down in such decisions of the English courts, the usual method of avoiding their conclusions was by saying that the English decisions were not the law, but only evidence of the law. This, in fact, became the common method of treating all English cases not found acceptable; it was easier than showing in each one of such cases that the principle involved was not applicable to conditions in this country.

Then there was the further practical difficulty, if all English

[12] See the article by Reinsch, "The English Common Law in the American Colonies," vol. ii, Bulletin of the University of Wisconsin, 23.

[13] "The Nature and Sources of the Law," § 525.

decisions prior to a particular period were to be regarded as binding, in the fact that not all of such decisions were accessible to the courts. In such a situation it was easier to adopt the general principles of the common law than its particular applications by the English courts. This practical difficulty is illustrated by two comparatively recent decisions of the Illinois and Kentucky courts.[14] Both courts agree that the question of criminal liability at common law in the case of agreements between competitors to maintain prices is to be determined by the law of conspiracy as settled in England prior to 1606, but they disagree entirely as to what that settled law was, and neither court bases its conclusions entirely upon actual decisions of English courts rendered before 1606. It would be a difficult matter, in the case of many subjects, to state the common law of England as it was prior to 1606 without taking cases since that date into account. Where the common-law method of developing the law by means of the decisions of courts prevails, it is possible to speak of decisions prior to a certain date, but it is very difficult to state the law in general prior to that date without regard to later decisions which have in fact settled the law as, theoretically, it always was in the particular jurisdiction.

It was not until there existed in the different states in this country courts regularly established, prepared to decide cases, write opinions, and apply the common-law principle of the authority of precedent, that it could be said that there was any law administered in this country which was substantially like the common law of England. But when that time arrived, when the highest courts in each state were regularly engaged in deciding cases and applying the rule of *stare decisis* to their own decisions, then there began to develop in each state a law of that state in precisely the same sense that there existed a common law in England developed by the English courts. If English decisions at first, no matter of what period, had as great influence with the state courts as if they were decisions of their own courts, this influence could not continue with the growth of the decisions of the separate state courts. The true state of the case has been concealed by the universal assumption that, at the same time that we adopted or created

[14] Chicago, W. & V. Coal Co. *v.* People, 114 Ill. App. 75, 104; 214 Ill. 421; and Ætna Insurance Co. *v.* Commonwealth, 106 Ky. 864, 880.

common-law courts to determine the common law in each state, we adopted also a whole body of law or system of principles known as the English common law, which, if properly understood and applied, would be a sufficient guide to the courts of each state in the determination of all questions that might come before them.[15] But, as already shown, if the adoption of the common law meant no more than the adoption of this so-called general law, then the application in each state of the common-law principle of the authority of precedent meant, not only the destruction of this general law, but the development in each state of a law different from the common law of England. Only if all English decisions were accepted by the courts in this country, not merely as *evidence* of the English common law, but as identical with it, could it be said that the whole common law of England had been adopted. The refusal to follow English decisions means necessarily the development in each state of a law different from the English law, just as the refusal of the federal courts to follow the decisions of the state courts on certain subjects means the development in the federal courts of a common law different from the law of the states.

The truth of the matter is, therefore, that the greater part of the law of the states which is in fact identical with the common law of England does not consist of the common law of England which was adopted and made binding upon our courts, but it consists of rules established by the English Courts which have in fact been accepted and followed by the courts in this country, without regard to the dates of the English decisions establishing such rules, and without consideration of the question whether such decisions are a part of the adopted common law and binding upon our courts or not. The distinction between English cases which are controlling because part of the adopted common law, and English cases which are not controlling because not a part of the adopted common law, is seldom noticed. The confusion and inconsistency which have resulted from the failure to keep the distinction in mind can be fully appreciated only after a careful examination of the cases in each state. That this confusion has contributed greatly to the uncertainty of the decisions of our

[15] The statutes which, in many states, expressly adopt the common law of England assume, apparently, that that law will enable the courts to decide all questions that may come before them.

courts there can be no doubt. At one time the decisions of English courts are accepted as conclusive of a question; at another time, or in another jurisdiction where the common law is equally controlling, English decisions are disregarded and a new common law, a law founded upon a supposedly better reason, is established in its place. If we had not adopted the common-law principle of the authority of precedent, the law of the better reason might be accepted as the law which all of our courts, as well as our law schools, should unceasingly strive to discover; but as this principle of the common law has now become established more or less securely in every jurisdiction, we can only hope that in time our courts will be at least as successful as the courts of England in establishing a reasonably definite and certain body of law in each separate state.

II.

The consideration of a few of the decisions of the courts in this country, if not sufficient to disclose all the uncertainty which has resulted from the failure to determine definitely what is meant by the common law of England, will at least show something of the variety of views entertained by the courts in regard to the adopted common law. Let us examine, in the first place, some of the cases in which the view is expressed that it was the whole of the common law of England that was adopted in this country, and not a portion of it merely, or only certain decisions of the English courts.

In Williams *v.* Miles [16] we have an excellent statement of this theory. In that case the question presented was whether a former will was revived by the destructio of a subsequent will which in terms revoked the former one. Lord Mansfield had held that, in such a case, the former will was revived, while the rule of the English ecclesiastical courts was the other way and was generally followed in this country. It was contended by counsel that the Nebraska statute adopting the common law of England required the court to follow the rule laid down by Lord Mansfield and applied in the English common-law courts, since English decisions prior to the Revolution were made controlling. As to this contention the court says:

[16] 68 Neb. 463.

"What is the meaning of the term 'common law of England,' as used in chapter 15 a, Compiled Statutes ?[17] Does it mean the common law as it stood at the time of the Declaration of Independence, or as it stood when our statute was enacted, or are we to understand the common-law system, in its entirety, including all judicial improvements and modifications in this country and in England, to the present time, so far as applicable to our conditions ? We can not think, and we do not believe this court has ever understood, that the legislature intended to petrify the common law, as embodied in judicial decisions at any one time, and set it up in such inflexible form as a rule of decision. The theory of our system is that the law consists, *not in the actual rules enforced by decisions of the courts at any one time*, but the principles from which those rules flow ; that old principles are applied to new cases, and the rules resulting from such application are modified from time to time as changed conditions and new states of fact require. . . . The term 'common law of England,' as used in the statute, refers to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or Civil Law system, which was in force in this territory prior to the Louisiana purchase. Hence the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution, in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system."

In this view, the adoption of the common law gives to the court of Nebraska the fullest power to determine for itself what it regards as the soundest or preferable common-law doctrine upon any subject.

In Chilcott *v.* Hart[18] it was contended by counsel that the Colorado statute,[19] adopting the common law, made English decisions prior to 1607 controlling where not changed by statute, while

[17] The statute reads : "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States . . . is adopted and declared to be law within said territory."

[18] 23 Col. 40.

[19] The Colorado statute is similar to that of Illinois and several other states, all of which follow the Virginia act of 1776, and provide that "the common law of England, so far as applicable and of a general nature, and all statutes or acts of the British Parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, and which are of a general natu e and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority."

English decisions since that time were not; that prior to 1607 the English rule was that executory devises which did not vest within lives in being were void, and that the period of twenty-one years and a fraction was not added until later, and therefore was not in force in Colorado. The contention as to what the law of England was prior to 1607 was probably unsound, but the court deals with the question of the common law of England that was adopted by the Colorado statute, and says:

"The rule against perpetuities was of slow growth, and in its development it was for no considerable period, if at all, that the time was thus limited to one life only. The common law thus being a constant growth, gradually expanding and adapting itself to the changing conditions of life and business from time to time, what the law is at any particular time must be determined from the latest decisions of the courts; and the recognized theory is that, aside from the influence of statutory enactments, the latest judicial announcement of the courts is *merely declaratory of what the law is and always has been.* We are at liberty, therefore, if not absolutely bound thereby, to avail ourselves of the latest expression of the English courts upon any particular branch of the law, in so far as the same is applicable to our institutions, of a general nature, and suitable to the genius of our people, *as well as to consult the English decisions made prior to 1607.*"

The Colorado court evidently agrees with the Nebraska court in regard to the adopted common law, although the statutes of the two states are not the same. In fact, statutes similar to that of Colorado have been construed in Illinois and Kentucky at least as adopting the English common law as it existed prior to the fourth year of James the First. The Nebraska statute, which contains no reference to the fourth year of James the First or any other period, is construed merely as excluding the civil law (which might otherwise be claimed to be in force in a state originally a part of Louisiana territory) or any other law which might be considered as different from the common law. What the adopted common law is, is left to the determination of the Nebraska court, and, as the Nebraska case above referred to shows, the court considers itself at liberty to prefer the rule of the English ecclesiastical courts to that of the English common-law courts, or even to adopt as preferable a rule different from that of the English courts.

It might be difficult, perhaps, to suggest any different interpre-

tation which could be given to such a statute as that of Nebraska, and the courts of other states which have adopted a similar statute seem to regard the adopted common law in the same light. For instance, in Lux *v.* Haggin [20] the question was as to the rule to be applied in California regarding the right of a riparian owner to appropriate the waters of a stream. The common law of England, by a statute passed in 1850, had been made "the rule of decision in all the courts of this state," and the court says that "the expression 'common law of England' designates the English common law as interpreted *as well in the English courts* as in the courts of such of the states of the Union as have adopted the English common law." The court then goes on:

> " And it was not the common law 'as the same was administered' at a certain date that was adopted, *but the common law*. . . . The statute adopts the common law of England, except where inconsistent with the constitution and statutes, and there can be no good reason why, to ascertain the common law of England, we should not refer to the decisions of English and American courts (in states where the common law prevails) rendered before and subsequent to the date of the statute.
>
> *Looking at the whole array of adjudications*, if we find a question has often been decided in one way . . . the rule of the common law involved or presented in the question ought to be considered as settled. . . . Where the rule has become settled, it is not, as opposed to any former decision, a new rule, but must be held to have been the law from the beginning, because 'right reason' has always been the prime element of the law. . . . Courts do not repeal former decisions: when they reverse them they hold they were never law."

The statute of the state of Washington is substantially like that of California. The case of Sayward *v.* Carlson [21] presented the fellow-servant question, and the court held it was not obliged, by the statute adopting the common law, to follow English decisions, that American courts as well as English courts decide what the common law is. "Therefore," the court says, "we have the common law as declared by the highest courts of this, that, and the other state, and by the courts of the United States, sometimes varying in each."

Many more expressions similar to those above quoted might

[20] 69 Cal. 255.

[21] 1 Wash. 29.

be given from the decisions of other state courts. It is not too much to say that they express the generally accepted view in most of the western states where the common law has been adopted by statute. Where the common law of England has not been adopted by express statute, some cases, as in Ohio, apparently hold that there is a common law of the state of which the law of England forms a part.[22] No English cases evidently are made controlling. In Pennsylvania, in the case of Lyle *v.* Richards,[23] we find the statement that our ancestors "brought with them the common law *in general*, although many of its principles lay dormant, until awakened by occasion."

The law which is followed or declared by the United States courts in connection with the decision of questions of so-called general law, where the rule of Swift *v.* Tyson applies,[24] and in cases where the federal courts have a special or exclusive jurisdiction, is a general common law substantially like that adopted in the states to whose decisions reference has already been made. Whether there is a common law of the United States — a much-discussed question — depends obviously upon what is meant by the common law. In connection with the classes of cases above referred to, the federal courts are developing a separate law in the same sense and by the same methods that the state courts are developing what is called the common law in the states.

This is clearly stated by the Court of Appeals for the Eighth Circuit in the case of Murray *v.* C. & N. W. Ry. Co.,[25] where the court says:

"It has always been assumed that the federal courts were endowed with a power and jurisdiction adequate to the decision of every cause, and every question in a cause, presented for their consideration, and

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[22] Railroad Co. *v.* Keary, 3 Oh. St. 201, 205; Bloom *v.* Richards, 2 Oh. St. 387, 390. See also State *v.* Cawood, 2 Stew. (Ala.) 360, 362.

[23] 9 Serg. & Rawle 330.

[24] An inconsistency in the application of the doctrine of Swift *v.* Tyson should be noticed. When a state adopts a statute governing matters of so-called general law, the federal court follows the statute and the decisions of the state courts interpreting it. Yet state statutes adopting the common law, and the decisions of the state courts determining the meaning of the statute, are disregarded by the federal courts, even though the common law of England, as adopted by statute, does not mean the same thing in every state.

[25] 92 Fed. 868.

of applying to their solution and decision any rule of the common law, admiralty law, equity law, or civil law applicable to the case, and that would aid them in reaching a just result, which is the end for which courts were created. If a case is presented not covered by any law, written or unwritten, their powers are adequate, and it is their duty to adopt such rule of decision as right and justice in the particular case seem to demand. It is true that in such a case the decision makes the law, and not the law the decision, but this is the way the common law itself was made and the process is still going on. A case of first impression, rightly [26] decided to-day, centuries hence will be common law, though not a part of that body of law now called by that name." [27]

And in the recent case of Kansas *v.* Colorado [28] the United States Supreme Court speaks of its decision of cases connected with boundary disputes between the several states as being in effect the creation of an "interstate common law." It is difficult to see, therefore, any real difference between the general or common law which the federal courts rely on in the decision of such matters, and the common law which states like Nebraska, Colorado, and California have adopted as the rule of decision for their courts in such cases as come before them. The only controlling body of law in any case is the law which the courts, state and federal alike, make, unless it can be said that the state courts are excluded from preferring a rule of the civil law as preferable to a settled rule of the common-law courts of England, while the federal courts are not. And, as a matter of fact, there are many principles established as law in the various states which have been introduced at different periods from the civil law, and which are not a part of the original common law of England.[29] The body of common law which is said to exist in the states is in no essential respect a different source of law from that which the federal courts rely upon.

Let us consider now some of the decisions in which the view is expressed that the adoption of the common law of England meant,

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[26] Is the use of this word intended to suggest that the common law consists of all cases rightly decided in all jurisdictions?

[27] See also Western Union Telegraph Co. *v.* Call Publishing Co., 181 U. S. 92.

[28] 206 U. S. 46.

[29] See Professor Beale's article in 23 HARV. L. REV. as to the adoption of the civil-law rule with respect to the law which governs a contract, an especially important question in this country.

not the adoption of the whole common law, but the adoption of the common law as it existed in England prior to some particular period, so that English cases prior to that time became binding upon the courts in this country.

The most interesting, and perhaps the most logical, view in this connection is that expressed by Chief Justice Marshall to the effect "that as the common law of England was and is the common law of this country, and as an appeal from the courts of Virginia lay to a tribunal in England, which would be governed by the decisions of the courts, the decisions of those courts, made before the Revolution, have all that claim to authority which is allowed to appellate courts." [30] Marshall states this theory again in two other cases,[31] but, in spite of the weight which is usually attached to an opinion of Marshall's, the view never gained general acceptance, although it is referred to with apparent agreement in some other cases,[32] and was accepted by Cooley as the correct exposition of the matter.[33] It is much easier, however, to find cases which state that English cases after the Revolution are not binding than it is to find cases where an English decision prior to that time, but after the settlement of the colonies, is followed for the reason merely that it is a binding authority.[34]

In some states the common law as it existed down to the time of the Revolution [35] is declared, either by a constitutional or statutory provision, to be in force. For instance, the Florida statute provides that "the common law and statute laws of England which are of a general and not of a local nature . . . down to the fourth day of July, 1776," shall be in force in that state. Without making a more careful search of the authorities in these states than the writer has found time for, it is impossible to say, however, that English decisions after the settlement of the colonies and before the Revolution are held in any of these states to be absolutely binding.

The prevailing view in the eastern states of the country seems

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[30] Murdock & Co. *v.* Hunter's Rep., 1 Brock. 135, 140-141.

[31] Cathcart *v.* Robinson, 5 Pet. (U. S.) 264, 280, and Livingston *v.* Jefferson, 1 Brock. 203, 210.

[32] Johnson *v.* U. P. Coal Co., 28 Utah 46; Mayor *v.* Williams, 6 Md. 235, 265.

[33] Cooley, Constitutional Limitations, chapters iii and iv.

[34] Gray, Nature and Sources of the Law, p. 232.

[35] For example, New York, Georgia, and Florida.

to be that decisions of English courts prior to the settlement of the colonies, particularly if regarded in England as establishing or settling the law of England, are to be regarded by the state courts as binding upon them. This, apparently, is the view which is taken also in those states which follow the Virginia statute of 1776, for instance Kentucky and Illinois. In Ray *v.* Sweeney [36] the Kentucky court holds that it is the common law as it existed prior to March 24, 1606, that is adopted, and says:

"To declare that the common law and statutes enacted prior to that time should be in force, was equivalent to declaring that no rule of the common law not then recognized and in force in England should be recognized and in force here, . . . and when it is sought to enforce in this state any rule of English common law as such, *independently of its soundness in principle*, it ought to appear that it was established and recognized as the law of England prior to . . . [March 24, 1606]."

In Illinois the statute seems to be given the same construction, although there has been considerable uncertainty in the decisions from the beginning. For instance, in Penney *v.* Little,[37] one of the earliest cases, the court said it did not consider itself restricted to the limits of the common law of England as it was prior to 1606, without subsequent improvements and modifications, "for the simple reason that it is more than two hundred years behind the age." Then, in a case a little later, Gerber *v.* Grabel,[38] the court accepted the English doctrine in regard to ancient lights on the ground that the English common law as it existed prior to the fourth year of James the First was adopted by the statute, while Judge Caton, in a separate opinion, expressed the view that it was the common law as administered in England at the time the Illinois statute was enacted that was adopted, although only English statutes prior to 1606 were included. In Guest *v.* Reynolds [39] the doctrine of ancient lights was repudiated on the ground that it was inapplicable to conditions existing in Illinois, and the court stated that it was not authoritatively settled prior to what period of time the common law was regarded as adopted. In People *v.* Williams [40] the court refers to the statute and says, "Thereby the great body of the English common law became, so far as appli-

[36] 14 Bush (Ky.) 1.
[37] 3 Scam. (Ill.) 301.
[38] 16 Ill. 217.
[39] 68 Ill. 478.
[40] 145 Ill. 573.

cable, in force in this state." Finally, in the Revell case,[41] which involved the right of shore owners to build structures out into the lake, the court says that the statute adopts "the common law as it existed prior to March 24, 1606," and that, "in the absence of any statute of the state changing the common law in regard to rights of riparian or littoral owners, the common law *as it then existed* must control."

The interesting point to notice in connection with this last Illinois case referred to is, that the particular rule accepted and applied, because a part of the common law of England as it existed prior to 1606, was in fact settled by a decision of the House of Lords[42] in 1876, as the Supreme Court of the United States says,[43] "after conflicting decisions in the courts below." Apparently, therefore, the Illinois court considers the recent decision of the House of Lords a conclusive determination of the common law as it in fact existed prior to the fourth year of James the First. It should be noticed also that, in a recent New York case,[44] the question decided in the Revell case is decided differently, although the New York court admits that the constitution of New York adopted the common law of England as it existed prior to the Revolution. The New York court, however, does not base its decision upon the ground that recent English decisions are no part of the common law, but on the ground that the principle of the English cases is inapplicable to conditions existing in New York. Yet in a recent English case[45] the House of Lords, referring to the case decided by it in 1876, says that "that decision was arrived at not upon English authorities only, but on grounds of reason and principle, which must be applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority of the *lex loci*," and therefore applies the rule to Canada. These cases sufficiently illustrate the difficulties of determining what the adopted common law is and how it is discovered, as well as what principles of the common law the courts may consider applicable to conditions existing in this

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[41] 177 Ill. 468.
[42] Lyon *v.* Fishmongers' Co., 1 App. Cas. 662.
[43] Shively *v.* Bowlby, 152 U. S. 14.
[44] Town of Brookhaven *v.* Smith, 188 N. Y. 74.
[45] North Shore Ry. Co. *v.* Pion, 14 App. Cas. 620.

country. A common law which is to be the rule of decision until altered by the legislature ought not readily to be held inapplicable by the courts.

It is worth noticing also that the law merchant, which did not become a part of the common law of England, so that it need not be proved as a foreign law, until the eighteenth century, is nevertheless considered a part of the adopted common law in this country.[46]

It has already been noticed that the Kentucky and Illinois courts, although they apparently agree as to the construction of the statutes adopting the common law, disagree as to what the common law of conspiracy was prior to 1606. In the Kentucky case[47] the court says:

"In the volumes of Wright and Stephen all the English cases cited on behalf of the Commonwealth are considered and discussed, and it is very conclusively shown that prior to 1607 there was no such thing at the common law as criminal conspiracy, except the confederacy for the false and malicious promotion of indictments and pleas, or for embracery or maintenance of various kinds, and that whatever may have been the *dicta* of the judges who decided subsequent cases, or the deductions drawn therefrom by some of the text-writers, the cases themselves, for more than two hundred years thereafter, do not support the contention made on behalf of the Commonwealth."

On the other hand, the Illinois court holds[48] that by the adopted common law every conspiracy which has a tendency to prejudice the public in general is a crime. The court says:

"We must look to the acts of Parliament enacted and to the judicial decisions handed down prior to the fourth year of James I for evidence of what the common law is. An examination of them shows that the points made and the conclusion reached by the learned judge in State *v.* Buchanan[49] are clear and correct statements of the common law concerning conspiracy as it existed at the time from which we adopted the same."

In concluding our examination of the cases it will be well to notice the Maryland case which is referred to by the Illinois court

[46] Cook *v.* Renick, 19 Ill. 598; Piatt *v.* Eads, 1 Blackf. (Ind.) 81.
[47] Ætna Insurance Co. *v.* Com., 106 Ky. 864, 880.
[48] Chicago, W. & V. Coal Co., 114 Ill. App. 75, 104.
[49] 5 H. & J. (Md.) 317.

in the case last referred to, because it states the theory of the adoption of the whole common law in a form which we might have expected to come across more frequently, — a theory, however, which the Illinois court was hardly justified in relying on for ascertaining the common law prior to 1606. The court in that case first says that "it is to judicial decisions that we are to look, not for the common law itself, *which is nowhere to be found*, but for the evidences of it," and then, after referring to English cases decided prior to the settlement of Maryland, goes on to say that it is a mistake to suppose that later English cases

"are expansions of the common law, *which is a system of principles not capable of expansion, but always existing*, and attaching to whatever particular matter or circumstances may arise and come within the one or the other of them. . . . *Precedents therefore do not constitute the common law, but serve only to illustrate principles.* And if there were no other adjudications on the subject to be found, the judicial decisions since the colonization furnish *conclusive evidence*, not only of *what is now understood to be the law of conspiracy* in England, so far as these decisions go, *but of what were always the principles on which that law rests.*"

The court then says that the section of the Maryland Bill of Rights adopting the common law of England "has no reference to adjudications in England anterior to the colonization, or to judicial adoptions here of any part of the common law during the continuance of the colonial government, but to the common law *in mass*, as it existed here, *either potentially or practically*, and as it prevailed in England at the time."

If what we have adopted is indeed the whole common law, or the common law "in mass," then it may well be that, rather than to speak of a developing common law, which is in constant process of improvement by means of the decisions of the courts in all common-law jurisdictions, as is maintained by the courts of some of the states, it is better and more logical to adopt, with the Maryland court, the timeless, unchangeable, complete, and perfect common law which exists nowhere. Then, in truth, only those cases, "rightly decided," as stated in the opinion of the federal court before referred to, would constitute conclusive evidence of the true common law; and no court could content itself, in the decision of any case, with the application of the easy rule of *stare decisis*, but

must determine each time that the decision to be followed is indeed rightly decided and in harmony with the true common law.

As has been previously explained, however, the constant search by the courts for the true common law (particularly if it is nowhere to be found) means the elimination of the principle of the authority of precedent, the distinguishing characteristic of the English common law. That principle of the common law of England at least has been accepted and applied to such an extent by our courts that, in most states to-day, any supposed duty on the part of the courts continually to review and modify their decisions to keep them in harmony with a true common law is lost sight of in the ever-present problem of the systematic and consistent development of the law in each state in accordance with common-law methods, and the principle of *stare decisis* in particular. The adoption of the common law of England has resulted in the creation in each state of courts possessed of the power of making and developing the law in each state as the English courts make it in England, and not with the power only of the courts of the countries where the civil law or some other system of law prevails. The exclusion of the civil law by the adoption of the common law has meant that at least. The first question always in every common-law jurisdiction is the determination, with respect to any question, of the already settled law of that jurisdiction. If English cases of some period, as well as cases already decided by the courts of each state, are to be regarded as controlling authorities, it is important that it should be known what those cases are. The previously settled law being ascertained, then, if the case in hand is not concluded thereby, other sources of law may be resorted to. But the fundamental problem in each jurisdiction is the systematic, consistent, and, so far as possible, certain development of the law by means of the cases decided by the courts which make the law for that jurisdiction. So only will the law in each state develop in accordance with the essential principles of the English common law.

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CONSTITUTIONAL ASPECTS OF THE FEDERAL TAX ON THE INCOME OF CORPORATIONS.[1]

AT the instance of President Taft, Congress at its special session inserted in the Tariff Act a section levying a tax commonly called the federal corporation income tax. It was the common report that the section was drafted by Attorney General Wickersham and passed upon by Senator Root and others, so that any criticism of its constitutionality must be made with considerable diffidence. It was also common report that this particular form of tax was selected instead of a general income tax, not only because the leaders were less fearful of its economic effects, but as well because the constitutional lawyers of the Senate were doubtful as to the fate at the hands of the court of a general income tax, and very properly desired to avoid presenting to the court a question at once so embarrassing and so likely to embroil the court in political and economic controversy.

That the drafters have succeeded in enabling the court substantially to reverse its decision in the case of Pollock *v.* Farmers' Loan & Trust Co.[1] without appearing so to do, and have consequently forestalled much popular agitation, is unquestionable. But whether they have drafted a tax which in fact does differ from the tax considered in the Pollock case, in the qualities that differentiate a direct from an indirect tax, is a matter of much interest and some doubt.

The Constitution contains in Article I the following provisions relating to taxation:

Section 2, par. 3. "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers."

Section 8, par. 1. "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States."

Section 9, par. 4. "No Capitation, or other direct, Tax shall be laid,

[1] 157 U. S. 429.

unless in Proportion to the Census or Enumeration herein before directed to be taken."

Since the Pollock case, there has been such doubt concerning the exact meaning of the phrase "direct tax" that a brief reconsideration of the historical evidence concerning its meaning and the early judicial interpretation of it may be pardoned.

In the first place, it is noticeable that the Constitution in the section conferring upon Congress the power of taxation does not use the phrase "direct taxes"; but distinguishes "taxes" from "duties, imposts and excises." So also, while it is provided that "direct taxes" shall be apportioned, it is not provided, as might be expected, that "indirect taxes" shall be uniform throughout the United States; but that "duties, imposts and excises" shall be uniform throughout the United States. It would appear that "duties, imposts and excises" were intended to describe all taxes not described by the word "tax" or by the phrase "direct taxes," and consequently that the word "tax" and the phrase "direct taxes" were used synonymously; and so it has been held.[2]

The task of interpretation must therefore be to discover what was the meaning common to each of these terms at the time the Constitution was adopted.

The English statutes at once reveal the meaning of the word "tax." The land tax, which was the common tax of that period and was a tax levied on landowners and measured by the value or amount of the land, was invariably in the English statutes and in the books called a "tax." All other levies were called either duties or imposts or excises, but generally duties.[3] It should, however, be remarked that no tax on the income derived from land, or indeed on any incomes, had been levied in England, and consequently that this tax had not been classified as either a tax or a duty in English law. This distinction was well known to English lawyers, and, of course, to American lawyers who depended upon the English laws and statute books for a large part of their law. It was definite, easily understood, and applied and worked substantial justice when read into the federal Constitution.

There is nothing, however, in the English statutes which serves

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[2] Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429.

[3] See article by Edward B. Whitney, 20 HARV. L. REV. 280.

to explain the phrase "direct taxes"; and for this purpose recourse must be had to the writings of the economists. Apparently the first noticeable use of the phrase "direct tax," and the first attempt to define that phrase, was made by the physiocrats, the prominent, indeed orthodox, school of French economists of the latter half of the eighteenth century. Like the English economists of the eighteenth century their speculations turned mainly upon the question of whether taxes were shifted from the persons actually paying the tax to others, and if so to whom. Their answer, which had many years before been outlined by Locke, was that all taxes were finally shifted upon and really paid by the landowners; and consequently they divided taxes into two great classes, — those which fell directly upon the ultimate taxpayer and could not be shifted, which were called "direct taxes"; and those which fell directly upon other members of the community, but which by the shifting process indirectly fell upon the landowners. The result of this was that they classed taxes on land and on the income derived from land as "direct taxes," and together with capitation taxes these were the only "direct taxes" recognized by this school.

The only other classification of taxes into "direct" and "indirect" which had been published prior to the adoption of the Constitution, was contained in Adam Smith's revolutionary work, the "Wealth of Nations," published in 1776. Adam Smith attacked the fundamental propositions of the physiocrats, demolished their theory that all taxes were shifted to the landowners, and conceding that taxes were shifted, proceeded himself to consider which taxes were and which were not shifted, classifying those that were as "indirect" and the others as "direct." Among others, he classed all income taxes among "direct taxes."

Proceeding now to consider which of these definitions was in the minds of the members of the convention, we can at once affirm that the phrase was used in the Constitution in its specific sense to denote certain taxes; rather than in its general sense to denote non-shiftable taxes. It was in this specific sense that it was commonly used by the physiocrats. During the eighteenth century there had been current numerous different theories, each with its band of advocates, as to what taxes could or could not be shifted; and doubtless this must have been known to the framers of the Constitution. It is utterly contrary to our conception of these

statesmen to suppose that they would insert in the Constitution a phrase with a meaning which differed according as one accepted one or another theory of economics; and it is beyond the bounds of possibility to suppose that this would have been done without any debate or discussion concerning the meaning of the phrase, as apparently was the case. The entire absence of any debate over the meaning of this phrase is the most emphatic evidence that it was well understood to have a definite meaning denoting certain specific taxes. Finally, that the word "tax," which had never been used or defined to denote non-shiftable taxes, and which had a well-known meaning in English law, was used synonymously with the phrase "direct tax," absolves any doubt concerning this.

It is equally evident that the convention did not have in mind the classification of taxes made by Adam Smith. The "Wealth of Nations" was only published eleven years prior to the framing of the Constitution, propounded revolutionary doctrines, and had not, so far as the evidence shows, been generally accepted or even generally read. It would be extraordinary that elderly statesmen framing a constitution, who were familiar with the language of the English law and who very largely received their notions of taxation and economics from the English law and the teachings of the physiocrats, — it would be nothing short of extraordinary, that they should adopt a revolutionary theory and embody it in a constitution. That they should have done so without even discussing the matter is almost inconceivable.

We must therefore choose from either the physiocratic or the legal classification. The two are identical, except that the former included capitation taxes and taxes on the income derived from land among "direct taxes," whereas the latter had been used in the English statutes to describe only the tax on land. However, as Parliament had never levied either a tax on the income derived from land or a capitation tax, it is not certain that these would have been classed as "duties." What is more natural than that the framers of the Constitution should assume that the legal word "tax" and the phrase "direct tax" used by the physiocrats referred to the same class of taxes, and that they should use this word and this phrase which had this definite and, as they assumed, identical meaning?

It is impossible to hold that they did not consider the economist's

definition, since that would leave the phrase "direct taxes" unaccounted for. Further, that "capitation taxes" were expressly included among "direct taxes" shows that the physiocrat's classification was meant to be adopted in the Constitution.

It was ably contended by counsel for the appellant in the Pollock case, that among "direct taxes" were also included a general tax on personal property and a tax on incomes; citing in support thereof, among other authorities, Alexander Hamilton's classification in his brief in the Hylton case, and the many remarks from Elliott's Debates tending to show that direct taxes were supposed to refer to the internal taxes theretofore customarily levied by the states.[4] These remarks, however, were by no means unequivocal, and it is extremely doubtful if they represented the sentiment of the convention. There is no evidence that the taxes levied by the states were commonly called "direct taxes," and consequently this forms a most insecure ground upon which to base a definition of this phrase, which is foreign to the usage of the economists and the English law, and which apparently was not current in this country. It is consequently reasonably apparent that the only taxes which were intended to be apportioned were taxes on land, on income from land, and capitation taxes, all of which can be equally well and justly apportioned.

Turning now to the decisions construing this phrase, we find confirmation for this view. Prior to 1895 no federal tax had ever been held by the Supreme Court to be a "direct tax." A tax on carriages,[5] a tax on insurance and the income of insurance companies,[6] a tax on banknote circulation,[7] a succession tax,[8] and finally a tax on incomes,[9] have been held to be not "direct taxes." Throughout these cases the Supreme Court has iterated and reiterated, and finally based its holding upon the proposition that the only "direct taxes" are a capitation and a land tax. But nowhere has the court defined what is meant by "land tax." Commonly, of course, this means a tax on land, *i. e.*, a tax on a person because of the ownership of land. But in a broad sense it may include any

[4] See report of argument in Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429.
[5] Hylton *v.* United States, 3 Dall. (U. S.) 171.
[6] Pacific Insurance Co. *v.* Soule, 7 Wall. (U. S.) 433.
[7] Veazie *v.* Fenno, 8 Wall. (U. S.) 533.
[8] Scholey *v.* Rew, 23 Wall. (U. S.) 331.
[9] Springer *v.* United States, 102 U. S. 586.

tax upon land or its increment, and hence a tax upon income from land. There is in none of these cases anything clearly inconsistent with such a definition.

The case of Pollock *v.* Farmers' Loan & Trust Co. injected an entirely novel factor into the situation. It was a bill in equity by a stockholder of the Farmers' Loan & Trust Co. praying for an injunction against the company and its directors, enjoining them from paying to the United States Collector of Internal Revenue the income tax imposed by §§ 27–37 of the Tariff Act of 1894. The case was argued with the case of Hyde *v.* Continental Trust Co., which involved substantially the same facts. Attorney General Olney and Mr. Edward B. Whitney, then Assistant Attorney General, were allowed to intervene on behalf of the United States, and with James C. Carter, at that time the leader of the New York bar, who appeared for the Continental Trust Co., supported the constitutionality of the act. Opposed to them were Joseph H. Choate, who was then challenging Mr. Carter's leadership of the bar in New York, Senator Edmunds, Clarence A. Seward, and William D. Guthrie.

The bill of complaint alleged, among other things, that the Farmers' Loan & Trust Co. owned certain real estate and certain personal property from which it derived income, and it was contended that a tax upon such income was a "direct tax." Upon April 8, 1895, the court rendered its opinion, in which six of the justices concurred that the statute, so far as it taxed the rents and profits of land, levied a direct tax, and hence, not being apportioned, was unconstitutional. The court was evenly divided as to whether a tax on income from personalty was a direct tax.

Immediately upon the rendition of this opinion, the counsel for Pollock filed an application for a rehearing, in which the Attorney General joined, and which was at once granted by the court. Thereupon a reargument of the entire case was had, resulting in a decision from which four justices dissented, holding the entire income tax unconstitutional.

The rulings were based upon the following grounds:

1. That the framers of the Constitution regarded all taxes on real estate or personal property or the rents or income thereof to be direct taxes.[10]

[10] Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429, 573–574.

2. That there is no logical distinction between an income tax which in part falls on the rents of land, and a tax on land *eo nomine* or upon its owners in respect thereof, whence it follows that an income tax which falls in part on the rents of land is to that extent a direct tax.[11]

3. That there is no distinction, so far as any qualities of directness are concerned, between a land tax and a tax on personalty, and hence the same consequences follow.

That the court was right in its conclusion that a tax on the income from land was direct is evident from the preceding discussion; and it is equally evident, if the foregoing analysis is correct, that the court was wrong in its decision that a tax on personalty or its income was direct. It is at least probable that the case will remain authoritative upon the first proposition, but that it will ultimately be overruled as to the second.

Of the cases that have arisen since the Pollock case, construing the meaning of the phrase "direct taxes," none, with the possible exception of the latest, have overruled that case. In Knowlton *v.* Moore [12] the court sustained an unapportioned succession tax upon the inheritance of land. This case establishes that Adam Smith's definition of a "direct tax" as a tax which cannot be shifted, is not the constitutional definition, and was not held so to be in the Pollock case, and consequently virtually overrules the holding of the Pollock case that a tax on personalty or its income is a direct tax.

The cases of Nicol *v.* Ames,[13] holding a tax upon sales of merchandise at exchanges to be not direct; and of Thomas *v.* United States,[14] holding a stamp tax on a memorandum or contract of sale or a certificate of sale to be not direct; and the case of Patton *v.* Brady,[15] holding an excise on tobacco in the hands of the manufacturer or seller to be not direct, — are easily distinguishable from the Pollock case, and are not important in considering the character of the recent corporation tax.

Finally, there is the case of Spreckels Sugar Refining Company *v.* McClain,[16] which will play a most important part in litigation over this new tax. There was presented for the court's considera-

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[11] 157 U. S. 429, 579–581; 158 U. S. 601, 637.
[12] 178 U. S. 41. [13] 173 U. S. 509. [14] 192 U. S. 363.
[15] 184 U. S. 608. [16] 192 U. S. 397.

tion one section of the late war revenue act which provided as follows:

"That every person, firm, corporation or company carrying on or doing the business of refining petroleum, or refining sugar . . . , whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually a special excise tax equivalent to one-quarter of one *per centum* on the gross amount of all receipts of such persons . . . in their respective business in excess of said sum of two hundred and fifty thousand dollars."

The Spreckels Company, which was engaged in refining sugar, was taxed upon its gross receipts, which included receipts received for the use of its wharves by vessels unloading sugar, and income from capital invested in other concerns and not then required in the sugar business. The suit was brought to recover the taxes so paid. It did not appear that the wharves from which the company received rent were built upon its own real estate, and in the briefs this was not regarded as rent from land; but, together with the income from invested capital, was regarded by the plaintiff's counsel as income or receipts from personalty.

Two questions therefore were presented:

(1) Whether the tax so far as it fell on the receipts from the wharves and the investments was direct.

(2) Whether the tax so far as it fell on the receipts from the sale of sugar and other factors of the sugar business was direct.

Probably owing to the fact that only an insignificant amount was involved, the first point was virtually disregarded by the counsel and the court. Indeed, Mr. Johnson, counsel for the sugar company, devotes only a short paragraph in his brief to a bare statement, which he does not support by the slightest argument, that the tax so far as it is levied upon these receipts is direct, and the Solicitor General makes no mention of the separate problem raised by these receipts, but confines himself to a discussion of the second question. It is consequently not remarkable that the court failed to consider this problem; and so far, therefore, as this case decided that a tax on receipts from wharves and investments is not a direct tax, it is hardly a satisfactory or weighty ruling, although it may presage a return to the doctrine so frequently propounded prior to the Pollock case. Since it nowhere appeared that the wharves were real estate, it cannot be regarded as affecting the ruling of

the Pollock case upon the question of a tax on income from land.

The considered holding of the court in the Spreckels case, that a tax upon the gross receipts derived from sales of sugar was an excise, was clearly correct and not in conflict with the Pollock case. Taxes upon articles held in the manufacturer's hands for sale have since the earliest times, and even by Blackstone, been classed as excises. The Pollock case was founded on the taxation of personalty in the hands of the ultimate owner, and not in the hands of an immediate seller.

The questions presented by the present law are whether this tax is within the Pollock case, a tax on income from land or from personalty; and if so, what will be the consequences concerning its validity.

The law so far as material to this discussion reads as follows:

"SEC. 38. That every corporation, joint stock company or association . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association or insurance company, equivalent to one *per centum* upon the entire net income over and above five thousand dollars received by it from all sources during such year."

At the outset it is noticeable that the tax is expressed to be an "excise on the doing of business." While it may be conceded that such a description is material in determining the exact nature of the tax, yet it is not conclusive. Whether this tax is an excise tax on business, or whether it is a tax on land or on personalty within the reasoning of the Pollock case, must depend upon its real nature, to be discovered by ascertaining its attributes or characteristics. If it possesses all the attributes or characteristics of an excise on business, then certainly it must be held to be such a tax, irrespective of what name Congress has given it. So, also, if it possesses all the attributes or characteristics of an income tax, such as is a direct tax within the reasoning of the Pollock case, it should be held to be such a tax.

The instances are numerous in which the Supreme Court has held that in deciding upon the constitutionality of a tax it will look at the real nature of the tax and will not consider the name given

to the tax by the legislature as conclusive. In Home Savings Bank *v.* Des Moines [17] Mr. Justice Moody says:

"The first step useful in the solution of this question [whether bonds of the United States have been taxed by the state] is to ascertain with precision the nature of the tax in controversy, and upon what property it was levied, and that step must be taken by an examination of the taxing law as interpreted by the Supreme Court of the state. A superficial reading of the law would lead to the conclusion that the tax authorized by it is a tax upon the shares of stock. The assessment is expressed to be upon 'shares of stock of state and savings banks and loan and trust companies.' But the true interpretation of the law cannot rest upon a single phrase in it. All its parts must be considered in the manner pursued by this court in New Orleans *v.* Houston, 119 U. S. 265, 278, and Home Insurance Co. *v.* New York, 134 U. S. 594, with the view of determining the end accomplished by the taxation, and its actual and substantial purpose and effect. We must inquire whether the law really imposes a tax upon the shares of stock as the property of their owners, or merely adopts the value of those shares as the measure of valuation of the property of the corporation, and by that standard taxes the property itself."

So also in the case of New York Central Railroad Company *v.* Miller,[18] Mr. Justice Holmes, considering a tax of the State of New York expressed to be a "corporation franchise tax," which was computed upon the basis of the amount of capital stock of the corporation employed within the state, said at page 596:

"It is called a franchise tax in the act, but it is a franchise tax measured by property. A tax very like the present was treated as a tax on property of a corporation in Delaware, Lackawanna, & Western R. R. *v.* Pennsylvania, 198 U. S. 341, 353. This seems to be regarded as such a tax by the Court of Appeals in this case."

The learned judge thereupon considers the validity of the tax upon the theory that it is a property and not a franchise tax.

In Parker *v.* North British Ins. Co.[19] the Louisiana court, construing a statute, said:

"It is vain to call gross receipts 'capital'; they are not capital or capital stock, and no legislative declaration can make them so." [20]

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[17] 205 U. S. 503, 510. [18] 202 U. S. 584. [19] 42 La. Ann. 428.

[20] See also Ferry Co. *v.* Kentucky, 188 U. S. 385. A Kentucky tax on the "Kentucky franchise" of the Ferry Company between Kentucky and Indiana, holding

The first consideration must be to classify this tax. Not only will the question whether this tax is properly classified as an income tax or an occupation tax be most important in determining its constitutionality, but such a consideration will reveal the real attributes of the tax, which will facilitate the application of the principles adjudged proper in the Pollock case to determine what is and what is not a direct tax.

A tax is commonly described as being "on" some subject matter. But what it is which in difficult cases determines just what factor the tax is "on," has never been clearly defined. A tax on all persons who own land, of one per cent of the value of their land, can be at once classified as a tax on land. On the other hand, a tax on persons possessing red hair, of one per cent on the value of the land owned by them, is classified with some difficulty. Is it a tax on land? Or is it a tax on red hair? Or is it both? Or is it merely a tax on a particular class of land, to wit, land owned by red-haired persons?

Taxation is the taking by the state from the citizens of the state, or from persons within it or whose property is within it, of the necessary means for its support. It is accomplished by forcing the above-described persons to pay the state a certain contribution estimated in various ways, which may be done by forcibly taking from the citizen a certain portion of his property. Not only in theory is it a contribution to the state from its citizens or from aliens, but as a practical matter this must be so, since all property within the state is owned by citizens or aliens.

Generally, taxes are not levied upon all, but only upon a part of the persons subject to the taxing power, and hence almost every taxing statute has provisions which limit the class of persons from whom the tax is to be collected. Those provisions may comprise one or more factors, which may in theory be anything which is

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a franchise from both states, based upon the capitalization and earnings of said company was held to be a tax in part on the Indiana franchise. United States *v.* The Railroad Company, 17 Wall. (U. S.) 322; Bank of Commerce *v.* New York, 2 Black (U. S.) 620; Bank Tax Cases, 2 Wall. (U. S.) 200; Western Union Telegraph Co. *v.* Mass., 125 U. S. 530, holding that a tax on each corporation upon its *corporate franchise* at a valuation equal to the aggregate value of its shares of capital stock, is a tax upon the property and not upon the franchises of the corporation; City of Brookfield *v.* Tovey, 141 Mo. 619; Millerstown *v.* Bell, 123 Pa. St. 151; Harrisburg *v.* East, etc. Co., 4 Pa. Dist. Ct. 683. But see *contra*, Home Ins. Co. *v.* N. Y., 134 U. S. 594, where a tax on the corporate franchise equal to a certain per cent on the capital stock was held a tax on the franchise.

descriptive of persons. Thus, conceivably, they may be classified for taxation according to their ownership of land, or to their possession of red hair, or a large nose, or more than three suits of clothes, or according to their possession of all these factors.

That factor or those factors, for there may be more than one, which determine whether or not a person comes within or without the class taxed, are necessarily the particular factors against which the amount of the tax is charged by the taxpayer. If the possession of that factor is not of sufficient worth to the taxpayer to compensate him for the amount of the tax, he will rid himself of it, if he is able. The consequence is that as a practical matter the tax is a burden upon the factor or factors which determine the class of persons upon whom it shall be levied; and so may very properly be said to be a tax upon that factor, or upon those factors if there are several.

It is of course a simple matter to determine what in any given case are the factors which are the conditions of the levy of the tax. Very frequently, as in this case, the tax is *expressed* as being levied upon certain factors. But these factors upon which the tax is expressed as being levied are not always the only factors which determine whether or not a particular tax shall be levied. Every tax must necessarily specify some measure by which the amount of the tax will be determined; and that factor which measures the tax is always one of the factors which determine the levy or non-levy of a tax, since, if there is nothing upon which to measure the tax, no tax can be collected. Thus a tax on every person of one per cent on the value of his land is a tax on land, since it is the possession of land which determines whether or not a given person comes within the class of persons taxed. This has been frequently recognized by the courts, which may sometimes have laid undue stress upon this factor.

Thus in Dobbins *v.* Commissioners of Erie County [21] the court says, in answer to an objection that a certain tax was a tax upon the person of the officer and not upon the office:

"The first answer to be given to these suggestions is, that the tax is to be levied upon a valuation of the income of the office."

So also in the State Tonnage Tax cases,[22] the court, in holding that a state tax on vessels measured by the tonnage thereof was a tonnage tax, says:

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[21] 16 Pet. (U. S.) 435, 445.

[22] 12 Wall. (U. S.) 204.

"Attempt was made in the case of Alexander *v.* Railroad to show that the form of levying the tax was simply a mode of assessing the vessel as property, but the argument did not prevail, nor can it in this case, as the amount of tax is *measured* by the tonnage of the steamboats, and not by their value as property." [23]

This, however, is by no means a conclusive test, since it does not account for any specific taxes, and since the legislative body may measure the tax by some value entirely divorced from the persons taxed, — as, for instance, one thousandth of one per cent of the national debt. So, too, when several factors must coexist in order that the tax be leviable, this test fails to reveal all of these factors. All that can be said is that as a practical matter it is generally a sound test to discover one of the subject matters of the tax.

The new federal tax is expressed to be on corporations *doing business*, and is measured by the *net income* of such corporations. There are therefore three factors which determine whether the tax shall be levied, — (1) existence as a corporation, (2) doing business, (3) the receipt of a certain income. Unless all of these three are present in a given case, no tax is levied; if they are all present, a tax is levied.

Therefore according to the rules laid down above, this tax is a tax upon those several factors. The tax can be avoided by ridding oneself of any one of these factors. It must therefore be held to

[23] New York Central Ry. Co. *v.* Miller, 202 U. S. 584, a corporation franchise tax computed upon the basis of the amount of the capital stock of a corporation was held to be a tax on the property of a corporation; Society for Savings *v.* Coite, 6 Wall. (U. S.) 594, a tax equal to three-fourths of one per cent on the total amount of deposits held by banks is a tax upon the franchise and not upon the property, since the tax is measured by the amount of the business done, to wit, the amount of deposits; Providence Institution *v.* Mass., 6 Wall. (U. S.) 611, a tax on a savings bank on account of its deposits is a tax on its franchise; Western Union Telegraph Co. *v.* Mass., 125 U. S. 530, a tax upon corporate franchises at a valuation equal to the aggregate value of the shares of its capital stock at a specified rate thereupon, was held to be a tax on the property and not on the franchise; City of Brookfield *v.* Tovey, 141 Mo. 619, a city ordinance punishing merchants for selling goods without a license and providing for the issuance annually of a license upon payment to city treasurer of one per cent upon the cash value of the goods of the licensee, was held to levy a tax on the property and not to be a license tax on the occupation. See *contra*, Home Ins. Co., *supra*, 134 U. S. 594, where a tax on the franchise of a corporation based upon a percentage of the capital stock of said corporation, was held to be a franchise tax; Delaware R. R. Tax, 18 Wall. (U. S.) 206, a tax of one-fourth of one per cent on the actual cash value of every share of stock to be paid by the corporation, was held not to be a tax on the property of the corporation.

be not a tax upon any one factor separately, but upon all factors jointly; it must be charged up against those factors jointly and must be a burden upon them jointly. It is not a simple occupation tax, whose only factor is the conduct of an occupation; nor is it a simple tax on income, since that factor alone does not determine its levy or non-levy. It must be treated by the court as a complex tax upon "the net income of corporations which are engaged in business."

It is therefore clear that it is not identical with the income tax, which was considered direct by the Supreme Court in the Pollock case; but while it cannot be described as a general income tax, it is nevertheless a particular kind of income tax, just as it is at the same time a particular kind of a tax on business, to wit, on business carried on by corporations which are in receipt of a certain income, and consequently has many of the attributes of the tax declared to be direct in the Pollock case.

Like the income tax of 1894 it is levied only on those corporations doing business who are in receipt of income, is measured by the amount of income, and consequently is a charge against income. The one difference is that the former act applied to all incomes, whereas this act applies only to the incomes of corporations doing business; or, in other words, whereas in the case of the act of 1894 the receipt of income was the only factor which served to bring persons within or without the tax, here there are three factors, — being a corporation, doing business, and receiving income. Yet because of the necessity of these two other factors, does this tax any the less truly belong to the great class of income taxes, and has it not the same attributes of "*directness*" that are characteristic of an income tax?

Suppose for a moment a corporation carrying on the business of a trust company, which purchases a piece of land for its office, builds a large office building on the land, and rents whatever space it does not use for its own purposes. This company derives a part, perhaps a very considerable part, of its income from the rent of offices in its building. The federal tax collector demands and receives a tax of one per cent upon all its income, in which this rent is included. Surely in such a case this is a tax on the income derived from land. It has the same effect upon the land and its income as did the tax declared direct in the Pollock case. It is true that the legislature

did not single out and tax income from land at a separate rate and in a separate statute; but is this material? A general tax upon all property would certainly be held direct so far as it fell on land; and so must a general tax on incomes which falls upon income from land, as was held in the Pollock case. If the court holds this tax to be not direct in so far as it falls upon the rents of land, it will seem not only to be directly overruling the Pollock case, but to be disregarding the best evidence concerning what the framers of the Constitution had in mind.

The same conclusions apply to this tax so far as it may be levied upon income from personalty; but since the court's holding upon this point in the Pollock case is doubtful, and since it has virtually overruled itself in a later case, which, however, as has been pointed out, is not a weighty ruling, it is quite likely that it will not follow the Pollock case upon this.

Whatever action the court might be disposed to take regarding the Pollock case, when confronted with a set of facts identical with those presented by that case, need not be considered. While, as we have shown above, this tax is, so far as the quality of directness is concerned, essentially like the income tax of 1894, it has numerous incidental differences, — notably the description of the tax as an excise upon the doing of business, — which the court may seize upon as the ground of a distinction from the Pollock case. The Spreckels case furnishes an excellent basis for such a distinction; and the language of the Pollock case concerning certain earlier cases reënforces this.

Thus the court distinguished Pacific Insurance Co. *v.* Soule,[24] in which a tax upon the insurance done by, and the income of, an insurance company was held not to be a direct tax, on the ground that a tax "upon the business of an insurance company" was "a duty or excise." Yet in the Soule case part of the tax sustained was a tax upon the income of corporations.

So also the court in the Pollock case[25] refers to the case of Railroad Company *v.* Collector[26] as follows:

"In Railroad Company *v.* Collector, 100 U. S. 595, 596, the validity of a tax collected of a corporation upon the interest paid by it upon its bonds was held to be 'essentially an excise on the business of the class

[24] 7 Wall. (U. S.) 433. [25] 157 U. S. 429, 578. [26] 100 U. S. 595.

of corporations mentioned in the statute.' And Mr. Justice Miller, in delivering the opinion, said: 'As the sum involved in this suit is small, and the law under which the tax in question was collected has long since been repealed, the case is of little consequence as regards any principle involved in it as a rule of future action.'"

Whether the court will seize upon such a distinction to sustain this tax will depend very largely upon its opinion of the ultimate wisdom of the holding of the Pollock case. The difficulty of harmonizing a decision upholding this statute and the Pollock case can hardly be unnoticed by the court. If the court were of opinion that the fundamental reasoning of the Pollock case is sound, it would doubtless annul the new tax; but if the court views with disfavor the decision of the Pollock case, it can virtually overrule that case without seeming to do so, by relying upon the authorities last cited.

Francis W. Bird.

New York City.

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MR. EZRA RIPLEY THAYER, A.M., LL.B., became Dean of the Law School and Dane Professor of Law on the first of September. Dean Thayer was born in 1866, received the degrees of A.B. from Harvard in 1888, and of LL.B. from the Law School in 1891. While in the Law School he served for two years upon the Editorial Board of this Review. He was formerly Lecturer on Massachusetts Practice in the Law School and was a member of the firm of Storey, Thorndike, Palmer, and Thayer of Boston. Himself the son of the late James Bradley Thayer, for thirty years Professor in the Law School, he brings to the duties of his high office the best to be gleaned from the traditions and training of the Law School, and from the experience of the New England Bar.

HON. JEREMIAH SMITH, LL.D., resigned the Story Professorship of Law on the first of September. Born in 1837, a graduate of Harvard College in 1856, for seven years a justice of the Supreme Court of New Hampshire, an honor he attained at the age of thirty, twenty successive classes in the Law School retain the stamp of contact with his broadly trained legal mind, and with his upright and unselfish personality. This Review takes the occasion to acknowledge to him as one of its most valued contributors the debt of gratitude of a score of Editorial Boards for unfailing advice and assistance, and for numberless courtesies.

MR. ROSCOE POUND, PH.D., has been appointed Story Professor of Law. Professor Pound was born in 1870, graduated from the University of Nebraska in 1888, and studied for one year at this Law School with marked distinction. He has taught law in the University of Nebraska,

Northwestern University, and the University of Chicago, having in addition served for some years as Dean of the Law Department of the first-named institution. His work on the Supreme Court Commission of Nebraska from 1901 to 1903 added supplementary honors to his well-established renown as a teacher; while his services on such committees as the Committee on Reform of Procedure are familiar to all those in touch with this important branch of the work of the American Bar Association. Friends of the Law School will welcome the addition to its Faculty of a scholar widely known for his contributions to the fields of natural science and of the theory and the practice of the law.

Fourth-Year Course. — A Fourth-Year Course leading to the degree of Doctor of Law has been added to the Law School curriculum. This degree will be conferred upon graduates of the Law School, or of other schools qualified to be members of the Association of American Law Schools upon one year's residence after receiving the Bachelor's degree. "To be admitted as candidate for the degree of Doctor of Law, a student must be qualified to enter the Law School as candidate for the Bachelor's degree, and must have completed the course for Bachelor of Laws with high rank." He must pass "with distinguished excellence examinations upon courses open to fourth-year students requiring in the aggregate ten hours of lectures a week during the entire year; and in such courses must be included the course in Roman Law and the Principles of the Civil Law, and courses aggregating at least two hours of lectures a week from the courses offered exclusively to students in the fourth year."

The Law School. — The Law School opened with an unprecedented number of changes in the curriculum. Professor Wambaugh's course on International Law and Professor Beale's course on Jurisprudence have been made fourth-year courses. New courses offered for the fourth year are a course on Roman Law by Professor Pound, a course on Administrative Law by Professor Wyman, and a course on the History of the Common Law by Professor Beale. In the programme of instruction for the first three years, Dean Thayer will conduct the courses on Torts and on Evidence. Professor Pound will conduct the courses on Equity for both the second and third years, and also the course on Quasi-Contracts. Professor Gray will have charge of the course on Property for the second year, and will be assisted by his son, Mr. Roland Gray, A.B., LL.B., 1898, a former editor of this Review, who has been appointed Lecturer on the Law of Property. Mr. Austin Wakeman Scott, A.B., LL.B., 1909, a former editor of this Review, who has been appointed Assistant Professor of the Law, will conduct the courses on Trusts and on Civil Procedure at Common Law, and will also assist Professor Beale in the course on Criminal Law. Mr. Joseph Warren will assist Professor Wambaugh in the course on Agency. Mr. Allan Reuben Campbell, A.B., LL.B., 1902, a former editor of this Review, who has been appointed Lecturer on New York Practice, will conduct the course of that name. The remainder of the curriculum is substantially unchanged.

JUDICIAL CONTROL OVER RULES OF LEGISLATIVE PROCEDURE. — In determining what is the existing statute law, an English court seeks only the actual expression of the legislative will, although that expression is not in the form required by previous statutes. To the extent of the inconsistency the earlier acts must be deemed repealed.[1] What Parliament has in fact enacted has for centuries been finally determined by inspection of the parliamentary records in Chancery.[2] Faulty records must be corrected by Parliament.

In this country the limitations on legislative power contained in the written constitutions have caused confusion. Primarily, there is the well-recognized doctrine that if the subject matter of a statute conflicts with constitutional provisions, to that extent the courts will declare the statute void. If a court decides that an act, for example, impairs the obligation of contracts, it holds that the statute is void on its face. But if it declares a statute void as not having been passed according to the rules of legislative procedure established by the constitution, it must look at something besides the constitution and the act as enrolled and recorded; for the contents of the latter give no clue to the manner of its enactment. The question then arises, has a court a right to look behind the enrolled act?

Many courts have decided that the enrolled act is not conclusive.[3] Their reasoning has been as follows: the constitution has directed the legislature to follow certain rules; failure to conform makes the act *ultra vires;* it is the duty of the court to declare an unconstitutional statute void.[4] Such decisions have assumed that the determination of whether a bill has gone through all the procedure laid down by the constitution as a condition precedent to its becoming a law, is a judicial question. But it is a recognized principle of constitutional law that in some questions the judiciary must abide by the determination of another department of government.[5] It seems clear that it is the special duty of the legislature to decide whether it has actually enacted a law, and that its certificate to that effect should conclude the courts. This is universally recognized to the extent of admitting that the actual existence of an act and its passage according to rules cannot be tried by parol evidence.[6] Some record must be taken as the basis of judicial knowledge. Because the constitution orders certain facts to appear in the journals of the houses, many courts have held that these are constituted the final record.[7] Thus a recent case declared void a duly enrolled act, because the yeas and nays of the final vote in each house had not been

[1] This follows directly from the sovereignty of Parliament. The same is true in this country where the rule was made by an earlier statute only. McDonald *v.* State, 80 Wis. 407.

[2] The King *v.* Arundel, Hob. 109. See Edinburgh Ry. Co. *v.* Wauchope, 8 Cl. & F. 710. The records for private acts are the Rolls of Parliament.

[3] Perry *v.* Baltimore & Drum Point R. R. Co., 41 Md. 446; Spangler *v.* Jacoby, 14 Ill. 297; Wells *v.* Missouri Pac. Ry. Co., 110 Mo. 286.

[4] See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., ch. vi.

[5] Luther *v.* Borden, 7 How. (U. S.) 1; *In re* Legislative Adjournment, 18 R. I. 824.

[6] State *ex rel.* Herron *v.* Smith, 44 Oh. St. 348; Wise *v.* Bigger, 79 Va. 269.

[7] Board of Supervisors of Ramsey County *v.* Heenan, 2 Minn. 330; Commissioners of Stanley County *v.* Snuggs, 121 N. C. 394. *Contra,* Field *v.* Clark, 143 U. S. 649; Pangborn *v.* Young, 32 N. J. L. 29; State *ex rel.* Reed *v.* Jones, 6 Wash. 452; Lafferty *v.* Huffman, 99 Ky. 80.

entered in the journals, as directed by the state constitution. *Rash* v *Allen*, 76 Atl. 370 (Del.). Of course if the constitution directs the courts to consider the journals the final record and to declare an act void if certain facts do not appear therein,[8] they must obey; but that is not the better interpretation of a provision that a bill shall not become a law unless there be certain entries. For since the legislature can falsify the journals, the change from the record as established by custom would accomplish nothing. And it is submitted that the determination of whether the constitutional rules of legislative procedure have been followed is a political question. The vital function of the legislature is to enact laws, and it is not natural that the judiciary should be supervisors of a coördinate department's performance of its peculiar duty.[9]

Devices for Securing in Substance Direct Election of United States Senators. — The framers of the Federal Constitution undoubtedly intended that the state legislatures should exercise a deliberative choice in electing United States senators.[1] Yet many schemes have been devised for defeating that intention. Doubtless, from the very first, individual candidates for the legislature pledged themselves to support a particular candidate for the Senate. Frequently a party convention indorses one candidate for senator, and it is understood in advance that if that party has a majority in the legislature its nominee will be senator as a matter of course. Where, as in the famous race between Abraham Lincoln and Stephen A. Douglas, the question of electing a senator overshadows all other issues, the election of senators is practically direct.[2] Direct election may be even more nearly approached when the party nominee is chosen by direct primary. In the recent case of *State ex rel. Van Alstine* v. *Frear*, 125 N. W. 961 (Wis.), it was properly held that a statute providing for such direct primaries is constitutional, since they amount to no more than a petition; for the members of the legislature have the legal and, in the opinion of the Wisconsin court, the moral right to disregard the result if they see fit. At the regular elections in Oregon, the voters of all parties express a choice for senator from among the different party nominees for that office, and provision is made for a formal pledge by candidates for the legislature to abide by the result of the popular vote.[3] When such a pledge is prescribed as a requisite for eligibility to the legislature the line of constitutionality

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[8] Where the constitution provided that notice of application for special acts should be given, that the legislature should prescribe the time and place of giving notice, the evidence thereof, and how such evidence should be preserved, it was held to mean that whether or not notice had been given was a judicial question. Ewing *v.* Trenton, 57 N. J. L. 318.

[9] See Field *v.* Clark, *supra;* Pangborn *v.* Young, *supra;* State *ex rel.* Jones *v.* Reed, *supra.*

[1] See 2 Gilpin, Madison Papers, *passim*, especially 812–821; 12 Lodge, Works of Hamilton, 126, 129.

[2] See 2 Nicolay and Hay, Abraham Lincoln, 136.

[3] Bellinger and Cotton, Annotated Code and Statutes, 957; General Laws (1905), 19.

seems to have been passed.[4] Nevertheless the legislature might still be said to have the legal power to disregard the popular vote; for state constitutions commonly provide that, "deliberation, speech and debate in either house of the legislature . . . cannot be the foundation of any accusation or prosecution, action or complaint in any other court or place whatsoever."[5] Were those provisions removed and violation of ante-election pledges made a crime, an election by the legislature in violation of its members' pledges would doubtless be effective, although subjecting the legislators to criminal prosecution. In such a state of affairs, even if the bare legal power to disregard the popular vote remained, no legislature would exercise that power. There would then be substantial nullification of the provision in the federal Constitution for "two Senators from each State, chosen by the Legislature thereof."[6]

The Senate is the "Judge of the Elections, Returns, and Qualifications of its own Members."[7] It might conceivably declare that a man chosen under one of these devices was not constitutionally elected. But it is believed that the existence of this power in the Senate does not preclude the courts from passing on the constitutionality of statutes providing for popular vote, when the question comes up in mandamus or injunction proceedings to require or prevent the taking of such a vote.[8] A decision of the Senate or even a resolution not called forth by any particular case (although not binding on future sessions of that body) would of course be followed by the courts. But it is submitted that, in the absence of any precedent in the Senate journal, every possible doubt should be resolved by the courts in favor of the constitutionality of these devices, otherwise the matter can never be squarely presented to the Senate where the final decisions of these questions must rest.

THE LEGALITY OF VOTING TRUSTS. — The most common device today of majority stockholders to secure stability in the corporation's policy and administration is the so-called "voting trust." The stockholders transfer their shares to trustees with power to vote them, and receive in return certificates giving all the beneficial interest in the stock except the voting power. The validity and effect of these agreements have been the subject of a great diversity of judicial opinion, as is illustrated by two recent decisions reaching opposite results. In *Boyer* v. *Nesbitt et al.*, 76 Atl. 103 (Pa.), the validity of a voting trust formed by the majority stockholders of a corporation for the purpose of maintaining its then officers in power and continuing the same business policy, was in question. The trustees were given the power to vote the stock, and a first option to purchase, for the benefit of the remaining members,

[4] Such a provision has been held to violate the state constitution of North Dakota. State *ex rel.* McCue *v.* Blaisdell, 118 N. W. 141 (N. D.).

[5] MASS. CONST., Pt. I, Art. XXI. For similar provisions in other state constitutions see STIMSON, FEDERAL AND STATE CONSTITUTIONS, 236.

[6] U. S. CONST., Art. I, sec. 3. Compare the substantial nullification, without the aid of legislation, of the similar provision for indirect election of President.

[7] U. S. CONST., Art. I, sec. 5.

[8] But see State *v.* Blaisdell, *supra.*

the shares of any member of the syndicate who wished to sell. The agreement was held to be valid, and not in contravention of the Pennsylvania statutes providing for annual elections by stockholders, and that proxies should be good for only two months after their issue. It was further held that the option given to the trustees to purchase shares was an interest which prevented the revocation of their power to vote. Upon almost identical facts, and under a similar statute, it was held in *Bridgers* v. *First Nat. Bank of Tarboro et al.*, 67 S. E. 770 (N. C.), following previous decisions by the same court,[1] that a voting trust for fifteen years was against public policy and void, and an injunction was granted at the suit of a stockholder not a party to the agreement, restraining the trustees from voting the stock.

A few decisions and many *dicta* are undoubtedly to be found to the effect that voting trusts are illegal *per se*.[2] The reason usually given is that it is against public policy for the voting power to be separated from the beneficial interest. It is submitted, however, that this view is unsound, and imposes an unnecessary fetter on the freedom of contract. It is true that it is usually held to be impossible to give an irrevocable proxy,[3] but this is explainable by the well-known rule that an agent's power is always revocable.[4] The almost universal permission given by statute to the use of proxies, which were not allowed at common law in corporate voting,[5] is itself a sanction of the severance of the voting power from the beneficial interest. The old idea that a corporate franchise was a mark of favor and confidence from the state, imposing a duty on the shareholders to use their individual ability in the management of the corporation, is obsolete to-day, when incorporation is possible for nearly every one, and when many shareholders in large corporations are simply investors. A further objection to this so-called rule of public policy is, that ordinary trustees and pledgees of stock may vote it.[6]

Manifestly a voting trust or pooling agreement is invalid if it has an unlawful object other than the mere separation of the voting power and beneficial interest.[7] In nearly every case where such an agreement has been overthrown it was in fact tainted with some additional illegality, and the broad language used in some of the decisions is to be regretted.[8] It would seem, therefore, both on principle and on authority, that a voting trust is not illegal *per se*, and that each case should be decided on

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[1] Harvey *v.* Linville Improvement Co., 118 N. C. 693; Sheppard *v.* Power Co., 150 N. C. 776.

[2] Shepaug Voting Trust Cases, 60 Conn. 553; Clowes *v.* Miller, 60 N. J. Eq. 179; Vanderbilt *v.* Bennett, 6 Pa. Co. Ct. R. 193. See Ohio R. Co. *v.* State, 49 Oh. St. 668; Warren *v.* Pim, 66 N. J. Eq. 353, 363.

[3] Schmidt *v.* Mitchell, 101 Ky. 570; Woodruff *v.* Dubuque & S. C. R. Co., 30 Fed. 91. But see Brown *v.* San Francisco S. S. Co., 5 Blatchf. (U. S.) 525; Chapman *v.* Bates, 60 N. J. Eq. 17.

[4] Blackstone *v.* Buttermore, 53 Pa. 266.

[5] Taylor *v.* Griswold, 14 N. J. L. 222.

[6] *Re* North Shore, etc. Ferry Co., 63 Barb. (N. Y.) 556; Canadian Imp. Co. *v.* Lea, 69 Atl. 455 (N. J.).

[7] Clark *v.* Central R. R. & Banking Co., 50 Fed. 338, — suppression of competition.

[8] Cone *v.* Russell, 48 N. J. Eq. 208, — obtaining office; Shepaug Voting Trust Cases, *supra*, — secret profits for parties to the agreement; Hafer *v.* N. Y., L. E. & W. R. R. Co., 14 Wkly. L. Bul. 68, — restraint of trade; Gage *v.* Fisher, 5 N. D. 297, — obtaining office.

its particular facts.[9] If this proposition is granted, it would also seem that such an agreement should be irrevocable if made so in terms, and supported by a good consideration or coupled with an interest.[10]

FRAUD AND INCONTESTABILITY CLAUSES IN LIFE INSURANCE POLICIES. — Most life insurance policies now contain a clause providing that in certain contingencies the policy shall be incontestable. How does this affect the underwriter's right to contest liability because of deceit in the application for the insurance? This question presents two others: does the language of the clause mean that the defense of fraud is waived; and if so, is the stipulation valid to that extent? On the first of these the authorities are agreed that the words "shall be incontestable," without more, mean a waiver of the defense of fraud.[1] Moreover, on the principle of construing the contract most strongly against the underwriter,[2] courts have usually allowed the incontestability clause to prevail,[3] even where other parts of the contract indicate that misrepresentation shall be ground for refusal of payment.

This stipulation appears in two forms, the one stating that the policy is incontestable from date, and the other providing that it shall be so after the lapse of a given time. The validity of an agreement in a contract not to set up the defense of fraud in an action on that contract has often been at issue in cases foreign to the subject of insurance; and while there is a clear conflict of authority, the better view holds most agreements of this nature void.[4] Fraud does not "vitiate consent," [5] so as to make any negotiation into which it enters a nullity, but only gives the innocent party the option of avoiding the contract.[6] While this can be waived, after the fraud is discovered,[7] it is against public policy to permit a fraudulent person to reap benefit from his deceit merely by introducing an agreement about it into the original contract.[8] But it is submitted that in life insurance contracts the attitude of the law should be different.[9] In these the mooted provision is not inserted by the party seeking to benefit by it, but by the insurance company [10]

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[9] Mobile & Ohio R. R. Co. *v.* Nicholas, 98 Ala. 92; Williams *v.* Montgomery, 148 N. Y. 519; Smith *v.* S. F. & N. P. Ry. Co., 115 Cal. 584; Greene *v.* Nash, 85 Me. 148. See Brightman *v.* Bates, 175 Mass. 105; 15 HARV. L. REV. 756.

[10] See Chapman *v.* Bates, *supra;* Smith *v.* S. F. & N. P. Ry. Co., *supra;* 10 HARV. L. REV. 428. *Contra*, Griffith *v.* Jewett, 15 Wkly. L. Bul. 419 (Oh.).

[1] Mass. Benefit Life Assn. *v.* Robinson, 104 Ga. 256; Wright *v.* Mutual Benefit Life Assn., 118 N. Y. 237. But see Reagan *v.* Union Mutual Life Ins. Co., 189 Mass. 555.

[2] See National Bank *v.* Ins. Co., 95 U. S. 673, 678.

[3] Ins. Co. *v.* Fox, 106 Tenn. 347; Vetter *v.* Mass. National Life Assn., 29 N. Y. App. Div. 72. *Contra*, Welch *v.* Union Central Life Ins. Co., 108 Iowa 224.

[4] See 18 HARV. L. REV. 466.

[5] This language, however, is common. See VANCE, INSURANCE, 532.

[6] See Nealon *v.* Henry, 131 Mass. 153; WILLISTON'S WALD'S POLLOCK CONTRACTS, 706.

[7] See Wheeler *v.* McNeil, 101 Fed. 685.

[8] Hofflin *v.* Moss, 67 Fed. 440; Bridger *v.* Goldsmith, 143 N. Y. 424.

[9] See RICHARDS, INSURANCE, §§ 379, 380.

[10] Statutes in several states forbid companies to issue a policy without a clause of incontestability. See ALA. CIV. CODE, 1907, § 4573; MASS. ACTS & RESOLVES, 1907,

to make its policies more attractive. As the underwriter is under no obligation to accept an application for insurance on receiving it, it is possible, even if not altogether feasible, for him to inquire about the representations therein before issuing the policy.[11] If the clause of incontestability is enforced the practical result will be that the underwriter will be more vigilant while the matter is fresh [12] and that fewer policies will be issued to unsuitable persons. It is most undesirable, moreover, that it should lie in the power of the company to resist every claim with an allegation of fraud, advanced for the first time after the death of the person accused.[13]

When the clause makes the policy incontestable not from date, but after a given period, as is more common, its practical and intended effect is merely to create a short statute of limitations in favor of the insured.[14] This is not open to the objection of condoning fraud.[15] It would seem that it should be valid in those jurisdictions which respect agreements to shorten the statutory limitation, but invalid in those which do not. States holding the former view have always given the clause effect.[16] But one court, though bound by the latter view,[17] has recently held that a clause providing for incontestability after one year bars the defense of fraud after that time. *Citizens' Life Ins. Co.* v. *McClure*, 127 S. W. 749 (Ky.).[18] Its decisions seem irreconcilable,[19] and the latest case is a strong one for the validity of the incontestability clause.[20]

WHAT IS CRUEL AND UNUSUAL PUNISHMENT. — The inhibition of the infliction of "cruel and unusual punishment" first appears in the

c. 576, § 75, p. 896. In none, however, must the clause provide for immediate incontestability. For example, see N. Y. LAWS, 1906, c. 326, § 101 (amended by LAWS, 1907, c. 714).

[11] See Ins. Co. *v.* Fox, *supra.*

[12] See Wright *v.* Mutual Benefit Life Assn., 43 Hun (N. Y.) 61.

[13] This argument was advanced in Mass. Benefit Life Assn. *v.* Robinson, *supra;* Clement *v.* Ins. Co., 101 Tenn. 22, in which cases, however, the clause did not provide for immediate incontestability. Of the cases on immediate incontestability, Ins. Co. *v.* Fox takes the view expressed here. *Contra*, Reagan *v.* Union Mutual Life Ins. Co., *supra;* Welch *v.* Union Central Life Ins. Co., *supra.* See 19 HARV. L. REV. 470.

[14] See Drews *v.* Metropolitan Life Ins. Co., 75 Atl. 167 (N. J.); Murray *v.* State Mutual Life Ins. Co., 22 R. I. 524. Several courts have said that they would make a distinction between the two kinds of clauses. See Reagan *v.* Union Mutual Life Ins. Co., *supra;* Mass. Benefit Life Assn. *v.* Robinson, *supra.*

[15] Thus equity will cancel the policy for fraud, at the suit of the insurance company brought within the period. John Hancock Mutual Life Ins. Co. *v.* Houpt, 113 Fed. 572.

[16] Most jurisdictions hold this view. See Mutual Life Ins. Co. *v.* New, 51 So. 61 (La.); Flanigan *v.* The Federal Life Ins. Co., 231 Ill. 399; Brady *v.* Prudential Ins. Co., 168 Pa. St. 645.

[17] Union Central Life Ins. Co. *v.* Spinks, 119 Ky. 261. See also Omaha Fire Ins. Co. *v.* Drennan, 56 Neb. 623.

[18] This is apparently the first case in which this precise situation has presented itself.

[19] See New York Life Ins. Co. *v.* Weaver's Administrator, 114 Ky. 295, in which the same court decided that after the period specified in the incontestability clause, an insurance company which had paid the face of the policy could not maintain an action for deceit.

[20] No case has been found holding that an incontestability clause taking effect after a specified time, does not bar the defense of fraud after that time.

Bill of Rights of 1689,[1] at a time when the inhumanity of Judge Jeffreys of "Bloody Assizes" fame [2] and of his fellows under the Stuarts, loomed large in the popular mind. This provision was aimed at the barbarities of that period, such as burning and quartering,[3] and did not otherwise mitigate the severity of the criminal law.[4] In the Eighth Amendment to the Constitution of the United States the same prohibition is found, and though its operation is confined to the Federal legislature and judiciary,[5] similar provisions are included in practically every state constitution.[6]

The authorities differ widely as to the interpretation of this restriction. Following the principle of statutory construction that words in a subsequent act are generally to be given their recognized meaning in a former act *in pari materia*, some courts have said that this clause still means what it did when used in 1689.[7] Others have held that whatever is now considered cruel and unusual in fact is forbidden by it.[8] Another difference of interpretation intersects these divergent views and separates the courts which confine the words to the kind or mode of punishment [9] from those who extend their meaning to include as well its degree or severity.[10] In a recent case concerning such a provision in the Bill of Rights of the Philippine Islands, which has the same meaning as the Eighth Amendment,[11] the Supreme Court of the United States, committing itself to the most liberal interpretation, not only held that the clause was concerned with the degree of punishment, but approved the extension of its scope to keep pace with the increasing enlightenment of public opinion. *Weems* v. *United States*, 217 U. S. 349. It is, indeed, difficult to believe that a law passed in the twentieth century is aimed solely at abuses which became almost unknown two hundred years before, even though it is an exact transcript of an old bill. And excessive punishment may be quite as bad as punishment cruel in its very nature. The fear of judicial intermeddling voiced by one of the dissenting judges seems scarcely warranted, for the power to prevent disproportionate punishment is to be exercised only when the punishment shocks public feeling.[12] With this limitation, the progressive construction of this clause laid down by this case seems desirable.

All courts would agree in holding some punishments forbidden, as, to chain a prisoner by the neck for several hours so that he must remain standing, a modern imitation of the pillory.[13] Other punishments are universally held to be permitted by the clause, as fine and imprisonment

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[1] 1 Will. & Mary, Sess. 2. c. 2.
[2] See MACAULAY, HISTORY OF ENGLAND, 2 ed., vol. i, pp. 638–646.
[3] See Hobbs *v.* State, 133 Ind. 404, 409.
[4] See People *ex rel.* Kemmler *v.* Durston, 119 N. Y. 569, 576.
[5] Pervear *v.* The Commonwealth, 5 Wall. (U. S.) 475.
[6] Constitution of New York, Art. I, § 5. In some constitutions there is a provision that punishment shall be proportionate to the offense. Constitution of New Hampshire, Part First, Art. 18.
[7] Whitten *v.* State, 47 Ga. 297, 301.
[8] People *ex rel.* Kemmler *v.* Durston, *supra*.
[9] Aldridge *v.* Commonwealth, 2 Va. Cas. 447; People *v.* Morris, 80 Mich. 634.
[10] State *v.* Driver, 78 N. C. 423. See O'Neil *v.* Vermont, 144 U. S. 323, 339, 340.
[11] Kepner *v.* U. S., 195 U. S. 100.
[12] See State *v.* Becker, 3 S. D. 29, 41.
[13] *In re* Birdsong, 39 Fed. 599.

or the ordinary death penalty.[14] But whipping, and lengthy imprisonment or death for a minor offense are questionable.[15] In determining whether a punishment is cruel and unusual, courts have considered not only the kind and degree of punishment and the magnitude of the crime,[16] but the special conditions in a particular locality,[17] and even the customs and beliefs of a particular class of individuals; so a regulation that the hair of every prisoner should be cut to a uniform length of one inch would be a cruel and unusual punishment if enforced against a Chinaman with a queue.[18] "Unusual" must be construed with "cruel" even when the provision is disjunctive,[19] and a new and humane method of inflicting the old punishment of death, as electrocution, is not prohibited.[20] Nor is a punishment unusual because never before inflicted for a certain crime, as the death penalty for attempt to rob a train.[21]

THE EFFECT OF THE PAROL EVIDENCE RULE ON DEFENSES TO NEGOTIABLE INSTRUMENTS. — The injustice which is so often reached by refusing strictly to admit any contradiction to or variation of the terms of a negotiable instrument has frequently led the courts to create exceptions to the parol evidence rule. But they have by no means agreed on what exceptions shall be allowed, and on this question the Negotiable Instruments Law is silent. As one theory of admissibility, it has been suggested that evidence of a collateral agreement should be admitted if an action and recovery thereon would result in circuity of action.[1] The weakness of this theory is the assumption that the collateral agreement can be made the basis of an independent action.[2] Another suggestion is that though this evidence should be excluded if it concerns express terms of the instrument, an oral variation of implied terms should be admitted, if it had to be oral to preserve the instrument's negotiability.[3] But a term implied by law is a component part of the instrument, so that to vary it, varies the instrument as it stands.[4] A more logical rule is the one generally adopted for other instruments. That is, to allow the evidence to show that the instrument itself, apart from collateral

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[14] State *v.* Borgstrom, 69 Minn. 508; *In re* Kemmler, 7 N. Y. Supp. 145.

[15] See *In re* McDonald, 4 Wyo. 150, 161; State *v.* Driver, 78 N. C. 423. See Thomas *v.* Kinkead, 55 Ark. 502, 508.

[16] But a sentence of five years' imprisonment for receiving stolen property is not "cruel and unusual," though the thief could not be punished so heavily. People *v.* Smith, 94 Mich. 644.

[17] Matter of Bayard, 25 Hun (N. Y.) 546.

[18] Ho Ah Kow *v.* Nunan, 5 Sawy. (U. S.) 552.

[19] Storti *v.* Commonwealth, 178 Mass. 549.

[20] *In re* Kemmler, *supra*.

[21] State *v.* Stubblefield, 157 Mo. 360.

[1] See 2 AMES, CASES ON BILLS AND NOTES, 802. The results in the following cases support this view. Patterson *v.* Todd, 18 Pa. St. 426; Barry *v.* Morse, 3 N. H. 132.

[2] All agreements prior to the execution of a written instrument are merged in it. Borggard *v.* Gale, 107 Ill. App. 128.

[3] See WIGMORE, EVIDENCE, §§ 2443–2445. The results in the following cases support this view. Castrique *v.* Buttigieg, 10 Moo. P. C. 94; Coughenour *v.* Suhre, 71 Pa. St. 462.

[4] Charles *v.* Denis, 42 Wis. 56; Union Co. *v.* Lockwood, 110 Ill. App. 387.

agreements, never was enforcible between the parties, for example because of lack of consideration, or to show that no contract in fact has as yet come into existence.[5] But no agreement affecting an existing contract should be admitted.[6]

An application of these rules to a few cases will serve to illustrate their merits. For instance, it is universally held that the accommodating party may show lack of consideration if sued by the accommodated party.[7] This case can be supported on all three theories. First, a recovery here on the collateral agreement that the defendant should not be held, would be the full amount of the instrument, and thus would cause circuity of action. Consideration is an implied term of the note, so, on the second theory, its existence may be denied. Finally, the facts show the accommodating party never became liable to this plaintiff. Again, the weight of authority refuses to admit parol evidence to prove a promise not to sue this defendant.[8] Clearly on the first theory the evidence would be admitted. The second theory considers liability to an action an implied condition, and would allow evidence provided the agreement was omitted to preserve the instrument's negotiability. As a contract was created by the defendant's making the note or indorsing it to the plaintiff, no agreement contrary to the instrument is admissible on the third theory. Lastly, the weight of authority admits parol evidence of a condition precedent to delivery, but not of any other condition.[9] The first theory would admit not only these conditions, but conditions subsequent, if they avoid the whole instrument.[10] An exponent of the second view regards the absence of express conditions as an express statement that there are no conditions, and hence would exclude the evidence.[11] The third rule admits the evidence only if it shows there never was a contract between the parties, and thus accords with the weight of authority.[12]

In a recent Pennsylvania case, *Lockyer & Rhawn* v. *Poth*, 67 Legal Intell. 219 (Pa. C. P., Phila. County, March 17, 1910), evidence of an agreement to allow a renewal at maturity at the defendant's option, was admitted. By all these theories and by the weight of authority, this evidence is inadmissible.[13] A recovery would not be the amount of the note; the date of maturity is expressed; and finally, there was a good contract from the beginning.

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[5] Beard *v.* Boylan, 59 Conn. 181.
[6] Pratt Co. *v.* American Co., 50 N. Y. App. Div. 369.
[7] Thompson *v.* Clubley, 1 M. & W. 212; Cohen *v.* Goux, 48 Cal. 97.
[8] Davis *v.* Randall, 115 Mass. 547; Fairfield *v.* Hancock, 34 Me. 93. *Contra*, Dale *v.* Gear, 39 Conn. 89.
[9] Trumbull *v.* O'Hara, 71 Conn. 172; Westman *v.* Krumweide, 30 Minn. 313. *Contra*, Massmann *v.* Holscher, 49 Mo. 87.
[10] Bissenger *v.* Guiteman, 6 Heisk. (Tenn.) 277.
[11] See WIGMORE, EVIDENCE, § 2444.
[12] Ricketts *v.* Pendleton, 14 Md. 320.
[13] Wolk *v.* Rosenbach, 2 Pa. Sup. Ct. 587.

RECENT CASES.

BILLS AND NOTES — DEFENSES — FRAUD AS DEFENSE AGAINST INDORSEE: BURDEN OF PROOF. — The indorsee of a promissory note sued the maker, who pleaded that the note was procured from him by fraud and that the plaintiff was not a *bonâ fide* purchaser. *Held*, that the burden is on the plaintiff to show that he is a holder for value in good faith. *Cedar Rapids National Bank* v. *Myhre Bros.*, 107 Pac. 518 (Wash.).

For a discussion of the principles involved, see 23 HARV. L. REV. 640.

BILLS AND NOTES — INDORSEMENT — WHEN ASSIGNMENT OPERATES AS INDORSEMENT. — A note was transferred to the plaintiff with the words "I hereby assign my interest in this note," etc., written on the back. *Held*, that this is an assignment, not an indorsement. *Gale* v. *Mayhew*, 125 N. W. 781 (Mich.).

If the words used are "I assign this note," they have the effect of an indorsement. *Markey* v. *Corey*, 108 Mich. 184. But see *Briggs* v. *Latham*, 36 Kan. 205. But a distinction has been taken if the words "I assign my interest in this note" are used, since an indorsement involves more than a mere transfer of an interest. *Aniba* v. *Yeomans*, 39 Mich. 171. For a discussion of a case opposed to the principal case, see 12 HARV. L. REV. 566.

BILLS AND NOTES — OVERDUE PAPER — MATURITY UPON DEFAULT IN PAYMENT OF ONE OF SERIES. — The defendant gave the plaintiff a number of promissory notes, payable at different times, and secured by a chattel mortgage containing a clause that upon default in the payment of any of the notes the rest should immediately become due. The plaintiff recovered on several of the notes as they became due. Upon a subsequent default, the plaintiff again brought suit. *Held*, that the entire debt was due at the time of the first default, and the plaintiff's right of action was merged in his first judgment. *Banzer* v. *Richter*, 123 N. Y. Supp. 678 (Sup. Ct.).

For a discussion of a similar case reaching an opposite result, see 23 HARV. L. REV. 146.

BILLS AND NOTES — OVERDUE PAPER — PROMISE TO PAY ATTORNEY'S FEES. — An action was brought on a promissory note, containing a promise to pay ten per cent attorney's fees, if the note should be put into an attorney's hands for collection or suit. *Held*, that in order to recover on this promise the plaintiff must allege that he has paid, or contracted to pay, a certain amount for such services; and this amount will be the measure of his recovery. *Reed* v. *Taylor*, 129 S. W. 864 (Tex., Ct. Civ. App.).

The validity of a promise to pay attorney's fees is upheld by a small majority of the jurisdictions in this country. *Chestertown Bank of Maryland* v. *Walker*, 163 Fed. 510. *Contra*, *Exchange Bank* v. *Apalachian Land & Lumber Co.*, 128 N. C. 193. This majority is itself divided on the question of negotiability, the prevailing view being that such a note is negotiable. *Cudahy Packing Co.* v. *State Nat. Bank of St. Louis*, 134 Fed. 538. *Contra*, *Findlay* v. *Pott*, 131 Cal. 385. The argument against negotiability is that the amount of the note is uncertain, since it cannot be ascertained in advance whether an attorney will be employed, or, if so, what his charges will be. From this it appears that even when the amount of the fee is stipulated, the courts regard the promise as one of indemnity, and would limit recovery to the amount actually paid the attorney. Of those courts favoring negotiability, a few have decided squarely that this is a promise of indemnity. *Campbell* v. *Worman*, 58 Minn.

561. But instead of requiring the plaintiff to aver the amount paid in attorney's fees, some cases hold that the defendant may show, in mitigation of damages, that the amount was less than the sum stipulated. *Kennedy* v. *Richardson*, 70 Ind. 524. In several jurisdictions the plaintiff can recover the full amount as liquidated damages. *North Atchison Bank* v. *Gay*, 114 Mo. 203; *Exchange Bank of Dallas* v. *Tuttle*, 5 N. M. 427.

CARRIERS — CONTROL AND REGULATION — RIGHT TO RECEIVE COMPENSATION IN BARTER. — The Attorney-General brought an action to enjoin the defendant railroad from performing a contract to furnish transportation in return for advertising. *Held*, that such an agreement is a violation of the act forbidding a carrier to collect "a greater or less conpensation from one person than another." *State* v. *Union Pacific Ry. Co.*, 126 N. W. 859 (Neb.).

It would seem to be a necessary interpretation of the statutes regulating commerce that money should be the only standard of compensation receivable by carriers. Otherwise it would be impossible to insure equal charges to all. See *United States* v. *Atchison, Topeka, & Santa Fé Ry. Co.*, 163 Fed. 111; *Union Pacific Ry. Co.* v. *Goodridge*, 149 U. S. 680. Rebates and other forms of discrimination would be readily practicable with such fluctuating standards of value.

CARRIERS — LIMITATION OF LIABILITY — EXEMPTION FROM LIABILITY FOR NEGLIGENCE. — The plaintiff, a porter in the employ of an express company, was injured by the backing of the defendant's train. The express company had agreed with the defendant that its employees should have no cause of action for injuries resulting from the defendant's negligence, and the plaintiff had ratified this agreement in his contract of service, and assumed all the risks of his employment. *Held*, that the plaintiff cannot recover. *Dodd* v. *Central R. Co. of New Jersey*, 76 Atl. 544 (N. J., Sup. Ct.).

The general rule, supported by the weight of authority, is that a common carrier cannot limit its liability for injuries resulting from negligence. *Railroad Co.* v. *Lockwood*, 17 Wall. (U. S.) 357. The principal case, however, follows many similar cases in holding that the railroad does not stand in the relation of common carrier to the express company, and consequently may contract with it on any terms. *Express Cases*, 117 U. S. 1; *Baltimore & Ohio Southwestern Ry. Co.* v. *Voigt*, 176 U. S. 498. Considerable doubt is entertained as to the correctness of these decisions, and some state courts are opposed. *McDuffee* v. *Portland & Rochester R. R.*, 52 N. H. 430. The principal case involves the further question of the validity of the plaintiff's contract with his employer, exempting the railway from liability. While the principle of freedom of contract is not to be lightly disregarded, many courts have held that a contract between master and servant relieving the former from liability for negligence is against public policy and void. *Johnston* v. *Fargo*, 184 N. Y. 379. The present case is a weaker one, since the contract purports to exempt not the employer but the railway; but the economic disadvantage under which the employee bargains for employment is as great in one case as in the other.

CARRIERS — LIMITATION OF LIABILITY — NECESSITY FOR SPECIAL CONSIDERATION. — In an action against a common carrier for injury to goods in transit, the defendant pleaded a limitation of liability in the bill of lading. It did not appear that the plaintiff had been given an opportunity to choose between rates based upon the difference in the liability to be assumed by the defendant. *Held*, that such a limitation is void. *Pittsburg, etc. Ry. Co.* v. *Mitchell*, 91 N. E. 735 (Ind.).

The United States Supreme Court has held, in effect, that with nothing further than the mere assent of the shipper a carrier may limit its common-law

liability as an insurer. *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 427. The state courts, however, have thus far shown praiseworthy persistence in refusing to follow this decision. They insist that such a limitation can arise only from special contract, supported by valuable consideration. Carriage at reasonable rates, with unlimited liability, is merely the public duty of every carrier. Doing what one is already legally bound to do cannot be consideration for the relinquishment of the right to hold the carrier as an insurer. A lower rate, or its equivalent, can be the only basis of any special contract. *Wehman* v. *Minn., St. Paul & S. St. Marie Ry.*, 58 Minn. 22. It must be accepted without anything resembling compulsion; that is, there must be open to the shipper a reasonable and *bonâ fide* alternative, between the common-law rate and liability, and the limited liability and rate. *Louisville & Nashville R. Co.* v. *Gilbert Parks & Co.*, 88 Tenn. 430. The Supreme Court doctrine seems logically indefensible.

CONFLICT OF LAWS — RIGHTS IN PROPERTY — PROPERTY ACQUIRED BY SPOUSES AFTER MARRIAGE. — A French citizen was married in France. As there was no ante-nuptial contract, the wife under the French law had a community interest in his property. He subsequently became domiciled in New York, where he acquired real and personal property, and died intestate. *Held*, that the whole property is subject to the transfer tax. *In re Majot's Estate*, 92 N. E. 420 (N. Y.).

This affirms the decision of the Appellate Division, commented on in 23 HARV. L. REV. 400.

CONSTITUTIONAL LAW — CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONS — ELECTION OF UNITED STATES SENATORS. — A state statute provided for the nomination by direct primaries of candidates for the United States Senate. *Held*, that the statute is constitutional. *State ex rel. Van Alstine* v. *Frear*, 125 N. W. 961 (Wis.). See NOTES, p. 50.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — CRUEL AND UNUSUAL PUNISHMENT. — The minimum punishment provided by a Philippine law for the falsification of a public document was twelve years' confinement at hard labor with a chain at the ankle and wrist of the offender, deprivation for that period of marital and parental authority and of the rights of property, loss of the franchise and of the right to hold office, and perpetual subjection to surveillance. The Philippine Bill of Rights prohibited the infliction of cruel and unusual punishment. *Held*, that the law is repugnant to the Bill of Rights. *Weems* v. *United States*, 217 U. S. 349. See NOTES, p. 54.

CONSTITUTIONAL LAW — POWERS OF THE JUDICIARY — IMPEACHING ENROLLED ACT BY LEGISLATIVE JOURNALS. — The constitution of Delaware provided that "No bill . . . shall pass either house unless the final vote shall have been taken by yeas and nays, and the names of the members voting for and against the same shall be entered on the journal. . . ." There was in existence a duly enrolled bill signed by the presiding officer of each house and by the governor. *Held*, that unless the journals show the entries required by the constitution the act is void. *Rash* v. *Allen*, 76 Atl. 370 (Del.). See NOTES, p. 49.

CORPORATIONS — CORPORATE POWERS AND THEIR EXERCISE — PRACTICE OF LAW. — A statute of 1909 made it unlawful for any corporation to practice law. Certain exceptions in the statute made it necessary to determine whether, prior to 1909, it was lawful under any statute for a corporation to practice law. A former statute had authorized corporations to be formed "for any lawful

business." *Held*, that the practice of law is not a "lawful business" within the meaning of the statute. *In re Co-operative Law Co.*, 92 N. E. 15 (N. Y.).

The practice of law is a lawful business only for those who have fulfilled the statutory requirements. N. Y. CONSOL. LAWS (1909), TIT. JUDICIARY LAW, §§ 460, 466. A corporation could not meet the requirement of learning or good character, nor take an oath of office. It was contended in the principal case that the statute was satisfied if the corporation conducted its legal business through duly licensed attorneys. *Cf. State Electro-Medical Institute* v. *State*, 74 Neb. 40. But the corporate fiction cannot be so easily disregarded. If the attorneys employed by the corporation must act as its agents, in strict legal theory it is the corporation that is practicing law. The artificial entity intervenes between the licensed attorney and the client. Even if the attorneys were permitted to act entirely in their own names, public policy would condemn the business of finding clients for lawyers for a share in the fees. See *Langdon* v. *Conlin*, 67 Neb. 243; *Alpers* v. *Hunt*, 86 Cal. 78. The result in the principal case is a desirable one, since it protects the bar from the danger of having its members controlled by corporations financially interested in encouraging litigation.

CORPORATIONS — STOCKHOLDERS: RIGHTS INCIDENT TO MEMBERSHIP — LEGALITY OF VOTING TRUST. — The majority stockholders of a corporation transferred their stock to trustees, receiving trust certificates in return, under an agreement by which the trustees were to have an irrevocable power to vote the stock, and the privilege of purchasing at a certain price, for the benefit of the other members, the stock of any member of the syndicate wishing to sell, the object being to insure the continuance of the present membership and policy of the corporation. A transferee of some of the trust certificates sought to overthrow the agreement so as to enable him to vote his stock. *Held*, that the agreement is valid, and that the trustees' power, being coupled with an interest, is irrevocable. *Boyer* v. *Nesbitt et al.*, 76 Atl. 103 (Pa.).

An agreement to last for fifteen years, similar to the above, and for a similar purpose, was made by the majority stockholders of a banking corporation. A stockholder not in the agreement sought to have it overthrown, and the trustees enjoined from voting the stock. *Held*, that the agreement is against public policy and void, and that the trustees will be enjoined. *Bridgers* v. *First Nat. Bank of Tarboro et al.*, 67 S. E. 770 (N. C.). See NOTES, p. 51.

CRIMINAL LAW — DEFENSES — JUSTIFICATION UNDER PRIOR DECISION OF COURT. — A state statute making criminal the soliciting or accepting of any order for the sale or delivery of liquor was declared invalid by the Supreme Court of the state. Subsequently the same court overruled its decision and declared the law valid. In the meantime, the defendant violated the statute, and after the second decision, he was convicted. *Held*, that the conviction was wrong. *State* v. *O'Neil*, 126 N. W. 454 (Ia.).

For a discussion of this point, see 18 HARV. L. REV. 541.

CRIMINAL LAW — STATUTORY OFFENSES — VENDEE AS ACCOMPLICE OF VENDOR IN ILLEGAL LIQUOR SALE. — A purchaser in an illegal sale of intoxicating liquor testified against the seller. The seller contended that, as an accomplice, his testimony required corroboration. *Held*, that a purchaser is not an accomplice. *Trinkle* v. *State*, 127 S. W. 1060 (Tex., Ct. Cr. App.).

The witness is an accomplice of the defendant only if he could be indicted for the same crime. *Keller* v. *State*, 102 Ga. 506. The courts, however, uniformly declare that a purchaser of intoxicating liquors is not indictable. *Commonwealth* v. *Kostenbauder*, 20 Atl. 995 (Pa.). It is argued that the purchaser is not indictable for directly engaging in the sale, for a purchase is the exact

opposite of a sale. *Sears* v. *State*, 35 Tex. Cr. R. 442. The statute, specifying only the seller, by implication excludes the purchaser. *State* v. *Rand*, 51 N. H. 361. Similarly, a thief is not an accomplice of the receiver of his stolen goods. *Birdsong* v. *State*, 120 Ga. 850. A girl is not punishable as a party to her own seduction. *Regina* v. *Tyrrell*, [1894] 1 Q. B. 710. Nor is one accepting aid to escape from jail an accomplice of the person who furnishes it. *State* v. *Duff*, 122 N. W. 829 (Ia.). But in fact the buyer is a vital party to the sale. His action causes a breach of the law as surely as though he hired another to stab his enemy. These cases are properly explained as an exception to general principles based on public policy. The protection of the drinker intended by the statute would be nullified by his punishment. The state's most potent witnesses in liquor cases would be silenced through dread of conviction.

Damages — Measure of Damages — Conversion of Stock. — The defendants converted the plaintiff's stock, then worth $45,125, which they were carrying for him on a margin. The stock declined before the plaintiff learned of the conversion. Within a reasonable time thereafter in which to replace the stock, its highest market price was $26,625. The plaintiff still owed at the time of the trial $15,000 on his loan. *Held*, that the plaintiff is entitled to $45,125 less $15,000. *McIntyre* v. *Whitney*, 43 N. Y. L. J. 1809 (N. Y., App. Div., July, 1910).

Damages in actions for conversion should fully indemnify the plaintiff and at the same time prevent the defendant from profiting by his wrongdoing. *Suydam* v. *Jenkins*, 3 Sandf. (N. Y.) 614. The New York rule of damages for the conversion of stock is ordinarily its highest market price within a reasonable time in which the plaintiff might replace the stock after discovering the conversion. *Wright* v. *Bank of the Metropolis*, 110 N. Y. 237. But the purpose of this rule is to indemnify the plaintiff when the value at the time of conversion would fail to do so, as when the market rises after the tort. *Barber* v. *Ellingwood*, 137 N. Y. App. Div. 704. The court in the principal case thus limits its application, and holds that at least the value at the time of conversion, with interest, may always be recovered. The rule may result in compensating the plaintiff unduly, for the fact that he had not discovered the conversion while the market was high is conclusive that he did not then wish to sell. But the decision is reasonable, for the other rule would give the tort-feasor the profits of the transaction and so put a premium upon misappropriations by brokers. *Taussig* v. *Hart*, 58 N. Y. 425.

Damages — Mitigation of Damages — Benefit to Plaintiff. — The defendant town appropriated the plaintiff's property for highway purposes, without taking proper legal steps to condemn. The plaintiff brought trespass, and the defendant sought a reduction of damages by reason of the benefit which the plaintiff would derive from the highway. Both parties regarded the appropriation as permanent. *Held*, that the plaintiff may recover the full value of the land. *Pinney* v. *Town of Winchester*, 76 Atl. 994 (Conn.).

If the plaintiff's land had been properly condemned, damages would have been assessed under the Connecticut rule in eminent domain, allowing a set-off for special benefits to the remaining land. *Trinity College* v. *City of Hartford*, 32 Conn. 452. If the authority to condemn is not strictly pursued, the person acting under color of it becomes a trespasser, liable in some jurisdictions to exemplary damages. *Stewart* v. *Wallace*, 30 Barb. (N. Y.) 344; *Anderson, etc. R. Co.* v. *Kernodle*, 54 Ind. 314. The principal case is right in refusing to apply the rule in eminent domain to a clear case of trespass. The act is unlawful, and benefits imposed upon the owner cannot be applied to reduce damages. *Turner* v. *Rising Sun & Laughery Turnpike Co.*, 71 Ind. 547. The usual rule is to award damages for the trespass, and to compel the defendant to gain title

by lawful condemnation. *Republican Valley R. Co.* v. *Fink*, 18 Neb. 82. But where both parties treat the appropriation as permanent, damages may be assessed with reference to future injuries. *Fowle* v. *New Haven & Northampton Co.*, 107 Mass. 352. Hence the full value of the land is a fair measure, the judgment operating as a bar to future action.

EASEMENTS — PRESCRIPTION — RIGHT OF WAY OVER RAILROAD PROPERTY. — A railroad company had owned for seventy-five years the fee of certain land. Persons living in the neighborhood had used it as a road for thirty or forty years. *Held*, that, since prescription rests on the presumption of a grant, which a railroad company has no power to make for other purposes than those for which it acquired the land, no prescriptive easement of right of way can be acquired against a railroad. *Blume* v. *Southern Ry. Co.*, 67 S. E. 546 (S. C.).

The South Carolina court permits the acquisition of a fee against a railroad by adverse possession, but distinguishes the case of an easement by reasoning based wholly upon the fiction of a lost grant. *Hill* v. *Southern Ry.*, 67 S. C. 548. See *Matthews* v. *Seaboard Air Line Ry.*, 67 S. C. 499. It therefore falls into the error of considering the matter as a question of what a railroad can transfer voluntarily, rather than what can be acquired against it by reason of its laches. The case illustrates the desirability of abandoning the fiction of a lost grant, and resting prescriptive easements upon the plain analogy between adverse user and adverse possession. *Krier's Private Road*, 73 Pa. St. 109. The better cases agreeing in result with the principal case proceed on the ground that a railroad's right of way, being of a public nature, is unaffected by adverse possession. *Southern Pacific Co.* v. *Hyatt*, 132 Cal. 240. A well-considered case holds that where a railroad constantly uses a track on its right of way an easement cannot be acquired thereon by prescription. *Pennsylvania R. Co.* v. *Freeport*, 138 Pa. St. 91. But this exemption should not be extended to unimproved railroad property, and the weight of authority is opposed to the reasoning of the principal case. *Gay* v. *Boston & Albany R. Co.*, 141 Mass. 407; *Pittsburgh, etc. Ry. Co.* v. *Crown Point*, 150 Ind. 536; *People* v. *Eel River & Eureka R. Co.*, 98 Cal. 665.

EVIDENCE — OPINION EVIDENCE — MARKET VALUE. — In an action against a common carrier for failure to deliver household goods shipped by the plaintiff, the evidence of a witness, who testified that he knew the market value of such articles from having received the market quotations which covered the date in question, was excluded. *Held*, that the evidence should have been admitted. *Chicago, Rock Island & Gulf R. Co.* v. *Clark*, 129 S. W. 186 (Tex., Ct. Civ. App.).

That this is a proper method of proof is undoubted. *Whitney* v. *Thacher*, 117 Mass. 523. The theory upon which the decisions usually proceed is that the testimony of the witness is opinion evidence, and is admissible as such, though his opinion be based exclusively upon market quotations and price-current lists. *Fountain* v. *Wabash R. Co.*, 114 Mo. App. 676. It has also been held that the market quotations may themselves be offered in evidence, if their general accuracy is attested. *Sisson* v. *Cleveland & Toledo R. Co.*, 14 Mich. 489; *Cliquot's Champagne*, 3 Wall. (U. S.) 114. And recent decisions indicate that this view is gaining recognition. *State ex rel. Moseley* v. *Johnson*, 144 N. C. 257; *Mt. Vernon Brewing Co.* v. *Teschner*, 108 Md. 158; *Western Wool Commission Co.* v. *Hart*, 20 S. W. 131 (Tex.). If the documents themselves are admitted, it must be as an exception to the hearsay rule, and one which falls under none of the recognized heads. But to admit reliable market reports, such as guide men in business transactions, does not involve the dangers against which the hearsay rule is directed. And the practical convenience of showing market

prices at any given time, without the necessity of calling an expert to pronounce an opinion, based perhaps exclusively on that same report, is a strong reason for such an exception.

INJUNCTIONS — ACTS RESTRAINED — WHO CAN ENJOIN PROSECUTION OF ACTION. — The defendant had obtained a divorce from her husband, who had then married the plaintiff. The defendant commenced an action to have the divorce decree vacated. The plaintiff sought to enjoin this action. *Held*, that the injunction should not be granted, as the plaintiff is not a party to the action. *Guggenheim* v. *Wahl*, 122 N. Y. Supp. 941 (App. Div.).

Where justice seems to require the relief, equity will frequently enjoin the prosecution of an unconscionable action. *Seager* v. *Cooley*, 44 Mich. 14. But the courts are slow to extend this remedy to others than parties to the suit pending, and from the reasoning of a few decisions it might seem that this relief is strictly confined to such parties. *Finegan* v. *City of Fernandina*, 18 Fla. 127. Yet there are decisions supporting the right of an interested third party to enjoin an action. A party with a mere equitable interest in land can enjoin the suit of one wrongfully claiming a lien on the land, though he is not named as a defendant in that suit, if its continuation will result in a confusion of rights. *Adams* v. *Harris*, 47 Miss. 144. A very real interest on the part of the outsider and very urgent reasons are necessary to move a court of equity to such interference. *Smith* v. *Cuyler*, 78 Ga. 654. In the principal case it would seem that the plaintiff's interest and the urgency of stopping the defendant's action would make it proper for equity to intervene.

INSURANCE — CONSTRUCTION AND OPERATION OF CONDITIONS — CONDITION AGAINST INCREASE OF HAZARD. — In an action on an insurance policy, the defendant alleged a breach of a provision against "increase of risk by any means within the control or knowledge of the insured," in that the insured and others had conspired to set fire to the premises. *Held*, that in the absence of an act physically affecting the property, no increase has occurred. *Ampersand Hotel Co.* v. *Home Insurance Co.*, 198 N. Y. 495.

This decision is an application of the general rule that policies are to be construed against the insurer. *Philadelphia Tool Co.* v. *British American Assurance Co.*, 132 Pa. St. 236. Following this rule the courts have restricted the meaning of the clause in question in various ways. It is held that something of duration is implied, and that mere temporary increase is not sufficient to avoid the policy. *Angier* v. *Western Assurance Co.*, 10 S. D. 82. An increase of risk caused by the making of necessary repairs is not a ground for avoidance. *Townsend* v. *Northwestern Insurance Co.*, 18 N. Y. 168. It has furthermore been held that a condition as to increase of hazard applies only to acts done on the premises of the insured or on property under his control. *State Insurance Co.* v. *Taylor*, 14 Colo. 499. It is not broken where the increase is due to some external cause beyond his control. *Breuner* v. *Liverpool & London & Globe Insurance Co.*, 51 Cal. 101. In no case has it been held that a mere mental state, unaccompanied by a physical act affecting the insured property, constitutes such an increase in the risk as will avoid the policy.

INSURANCE — DEFENSES OF INSURER — EFFECT OF INCONTESTABILITY CLAUSE ON FRAUD. — A life insurance policy provided, "If the premiums are duly paid as required, this policy after it has been renewed beyond the first year, shall be incontestable." The premiums were duly paid, and the policy was renewed beyond the first year. To an action on the policy, the insurer pleaded that the insured made fraudulent representations in his application. *Held*, that the plea is bad. *Citizens' Life Insurance Co.* v. *McClure*, 127 S. W. 749 (Ky.).

See NOTES, p. 53.

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — MEASURE OF DAMAGES FOR BREACH OF COVENANT OF QUIET ENJOYMENT. — An action was brought by a lessee for breach of covenant of quiet enjoyment. *Held*, that the settled rule in New York is that the lessee can recover nominal damages only, with nothing for the value of the lease or improvements. *Thorley* v. *Pabst Brewing Co.*, 179 Fed. 338 (C. C. A., Second Circ.).

In an action by a vendee against the vendor for breach of covenant of quiet enjoyment, the measure of damages is the purchase price and interest, plus expenses incurred in defending the title. *Willson* v. *Willson*, 25 N. H. 229. Applying the same rule in actions between lessor and lessee, the New York courts have always given the lessee merely nominal damages, where nothing was paid for the lease, unless there has been bad faith on the part of the lessor. *Mack* v. *Patchin*, 42 N. Y. 167. But the general rule is, that the lessee can recover the value of the unexpired term, less the rent reserved. *Riley* v. *Hale*, 158 Mass. 240; *Lock* v. *Furze*, Harr. & R. 379. *Contra*, *Lanigan* v. *Kille*, 97 Pa. St. 120. As between purchaser and seller, it would be unfair to require the seller to pay the value of the land at the time of eviction, on account of costly improvements which a purchaser might have made; but this is not likely to be the case in the ordinary lease, and it seems the better rule to give the lessee full compensation for his loss.

MORTGAGES — EQUITY OF REDEMPTION — CLOGGING RIGHT BY COVENANT NOT TO REDEEM BEFORE CERTAIN DATE. — The plaintiff mortgaged his public-house and covenanted to buy all liquors from the mortgagee, and not to redeem for twenty-eight years. The mortgagee, however, upon any one of a great number of contingencies, might sell without notice, and subject to the "tie." *Held*, that the covenant not to redeem was unreasonable and void. *Morgan* v. *Jeffreys*, 74 J. P. 154 (Eng., Ch. D., Feb. 23, 1910).

Stipulations as to the time of repayment may clog the equity of redemption by making the mortgage irredeemable either (1) after a certain date, or (2) before a certain date. Stipulations of the former kind are universally held void. *Bradbury* v. *Davenport*, 114 Cal. 598, 599. Upon agreements of the latter type there has been remarkably little comment. Text writers seem to assume unqualifiedly that they are good. 2 JONES, MORTGAGES, 6 ed., § 1052. The true doctrine, however, seems to be that they are good only if the time fixed is reasonable, and the agreement is not otherwise unconscionable. Reasonableness is so dependent upon the attendant circumstances, and authorities are so few, that it cannot be accurately defined. The following limitations have been regarded as reasonable: *Brown* v. *Cole*, 14 Sim. 427 (one year); *Biggs* v. *Hoddinott*, [1898] 2 Ch. 307 (five years); *Saunders* v. *Frost*, 5 Pick. (Mass.) 259, 267 (six years, — *dictum*); *Teevan* v. *Smith*, 20 Ch. D. 724, 729 (five to seven years, — *dictum*); *Abbe* v. *Goodwin*, 7 Conn. 377 (fourteen years, even though the mortgagor tendered interest in full to the end of the term). Only one decision, besides that in the principal case, has been found holding such a stipulation void. *Talbot* v. *Braddill*, 1 Vern. 183 and 394 (thirty-one years). But the rule suggested seems consistent with the general attitude of equity toward the borrower. See 1 COOTE, MORTGAGES, 13.

MORTGAGES — FORECLOSURE — JUNIOR MORTGAGEE'S RIGHT TO SURPLUS. — A foreclosure sale was conducted by a receiver, who held a surplus after the debt of the first mortgagee was satisfied. The surplus was claimed by the mortgagor and the junior mortgagee, who had not applied to have the receivership extended for his benefit. *Held*, that the junior mortgagee is entitled to the surplus. *Vogel* v. *Nachemson*, 137 N. Y. App. Div. 200.

For a criticism of a case reaching the opposite result, see 21 HARV. L. REV. 61.

MUNICIPAL CORPORATIONS — FRANCHISES AND LICENSES — ENFORCEMENT OF PENALTY. — As one of the terms of its franchise to a street railway company, the city of New York imposed a license fee on each car put into operation. Later an ordinance was passed, fixing a penalty of fifty dollars per day for failure to pay the license fee. *Held*, that the ordinance is void. *City of New York* v. *New York City Ry. Co.*, 138 N. Y. App. Div. 131.

By the terms of its franchise the plaintiff agreed to have its street railway in operation by a certain date or to forfeit a deposit made with the defendant city. The road was not completed at the time set. *Held*, that although the sum does not represent liquidated damages, the deposit is forfeited. *Whitcomb* v. *City of Houston*, 130 S. W. 215 (Tex., Ct. Civ. App.).

Legislative sanction is necessary to enable a municipality to grant the use of its streets to railways, and the conditions which the municipality can impose depend upon express legislation or implications therefrom. DILLON, MUNICIPAL CORPORATIONS, 4 ed., §§ 717, 719. A condition that on failure to fulfill its agreement with the city the grantee of the franchise should forfeit a certain sum has generally been held good, on one or the other of two grounds: (1) Such a sum has been held to be liquidated damages, where the damage to the people of the city would be unascertainable. *Brooks* v. *City of Wichita*, 114 Fed. 297; *Turner* v. *City of Fremont*, 170 Fed. 259. (2) As the state can impose a duty on those entering into relations with it, and a penalty for breach of such duty, so a city, by delegated legislative authority, can collect the entire sum deposited, as a statutory penalty. *State Trust Co.* v. *City of Duluth*, 70 Minn. 257; *City of Salem* v. *Anson*, 67 Pac. 190 (Ore.). The first of the principal cases shows clearly that a penalty is invalid if imposed after the grant of the franchise, but the second shows that a penalty provided for by the terms of the grant will be enforced.

PAROL EVIDENCE RULE — SUBSTANTIVE LAW EXPRESSED IN TERMS OF EVIDENCE. — BILLS AND NOTES: ORAL AGREEMENT TO RENEW AT MATURITY. — The defendant was sued as maker of a note, and pleaded that it was orally agreed by the plaintiff that the note could be renewed at maturity at the defendant's option. *Held*, that this plea is a good defense. *Lockyer & Rhawn* v. *Poth*, 67 Leg. Int. 219 (Pa., C. P., Phila. County, March 17, 1910). See NOTES, p. 55.

POLICE POWER — REGULATION OF BUSINESS AND OCCUPATIONS — TRADING-STAMP COMPANIES. — A statute of Minnesota, in effect, made illegal the business commonly carried on by trading-stamp companies. *Held*, that the statute is not a proper exercise of the police power. *State ex rel. Simpson* v. *Sperry-Hutchinson Co.*, 126 N. W. 120 (Minn.).

The defendant was indicted under a statute prohibiting the business of issuing and redeeming trading-stamps. *Held*, that the statute is not unconstitutional as being an unreasonable interference with the freedom of trade and contract. *District of Columbia* v. *Kraft*, 38 Wash. L. Rep. 406 (D. C.).

These cases seem irreconcilable. The Minnesota case is supported by the weight of authority. *People* v. *Dycker*, 76 N. Y. Supp. 111; *Ex parte Drexel*, 147 Cal. 763; *Young* v. *Commonwealth*, 101 Va. 853. Only two decisions and one *dictum* support the District of Columbia case. *Lansburg* v. *District of Columbia*, 11 App. D. C. 512; *Humes* v. *Fort Smith*, 93 Fed. 857. See *State* v. *Hawkins*, 95 Md. 133. A trading-stamp company, although not manifestly illegal, may reasonably be considered as a parasite on legitimate trade, depending for its profits on the desire of the ignorant to gain something for nothing, and on either the non-redemption of a large number of its stamps or the fraudulent overvaluation of its "premiums." If such a view may not unreasonably be taken by a legislature, it is within the exercise of the police power to prohibit it.

POWERS — RELEASE OF SPECIAL POWERS IN GROSS. — Under a marriage settlement a fund of £60,000 was given in trust to A for life, and after her decease to her issue then living as she might by will appoint, and in default of appointment to her children in equal shares. By deed A covenanted with one of her children not to exercise her power of appointment in such a manner as to reduce his share to less than £7,000, nor so as to postpone the vesting in possession of such share beyond the period of her death. The provisions of the will were inconsistent with this agreement. *Held*, that the covenantee is entitled to £7,000 in possession, not under the deed but as in default of appointment. *In re Evered*, 102 L. T. Rep. 694 (Eng., Ct. of App., April 29, 1910).

For a discussion of the decision in the Chancery Division, see 23 HARV. L. REV. 394.

PUBLIC SERVICE COMPANIES — RIGHTS AND DUTIES — EXCLUSIVE CONTRACT. — The defendant, a hotel keeper, made a contract with the plaintiff telephone company, giving it the exclusive right to install and maintain a telephone exchange in the hotel. *Held*, that the provision granting the exclusive right is void. *Central N. Y. Telephone & Telegraph Co.* v. *Averill*, 92 N. E. 206 (N. Y.).

This decision affirms that of the Supreme Court, discussed in 21 HARV. L. REV. 62.

PUBLIC SERVICE COMPANIES — RIGHTS AND DUTIES — RIGHT TO TURN OFF WATER FOR NON-PAYMENT OF CHARGES. — The defendant city, engaged in furnishing water to its inhabitants, threatened to discontinue service to the plaintiff because of non-payment of charges. There was a *bonâ fide* dispute as to the amount due. *Held*, that the plaintiff may secure an injunction restraining such action, upon filing a bond guaranteeing the payment of any sum found to be owing. *City of Mansfield* v. *Humphreys Mfg. Co.*, 92 N. E. 233 (Oh.).

When a municipal corporation undertakes to supply its inhabitants with water or gas, it acts not by virtue of any rights of sovereignty but merely in the capacity of a private corporation. *Western Saving Fund Society* v. *City of Philadelphia*, 31 Pa. St. 175. And since it is engaged in public service, it is under obligation to serve all who come within its profession and tender the necessary charges. *Wood* v. *City of Auburn*, 87 Me. 287. Some courts have held that service may be discontinued where an undisputed bill remains unpaid. *Jones* v. *Nashville*, 109 Tenn. 550. But failure to exercise the right of withdrawal immediately, and acceptance of payment for water subsequently furnished, have been held to constitute a waiver of the right. *Wood* v. *City of Auburn*, *supra*. Other courts have held that non-payment of water rents by a former tenant of premises does not justify the company in refusing service to a new tenant. *Turner* v. *Revere Water Co.*, 171 Mass. 329. *Contra*, *Gerard Life Insurance Co.* v. *City of Philadelphia*, 88 Pa. St. 393. Where there is a *bonâ fide* dispute as to the amount due, it is generally held that the company may be enjoined from cutting off the supply. *McEntee* v. *Kingston Water Co.*, 165 N. Y. 27. In any case it would seem to be a violation of public duty to refuse present service upon tender of regular rates, on the ground of non-payment of past indebtedness.

RECEIVERS — CUSTODY OF PROPERTY BEFORE APPOINTMENT OF RECEIVER. — After a bill to dissolve an insolvent corporation had been filed and process served, but before the appointment of a receiver, property of the corporation was sold on execution, without the permission of the court. *Held*, that the sale was void. *Cobb* v. *Camden Savings Bank*, 76 Atl. 667 (Me.).

Property is received into the custody of the court impressed with all the exist-

ing rights and equities of creditors. *American Trust & Savings Bank* v. *McGettigan*, 152 Ind. 582. But when once *in custodia legis* it ceases to be subject to seizure and sale on execution without leave of court. *Chalmers* v. *Littlefield*, 103 Me. 271. In their determination of the precise stage in receivership proceedings at which property comes into *custodia legis*, the courts disagree. Maryland, following the old rule, places it at the time when the receiver actually takes possession of the property. *Farmers' Bank* v. *Beaston*, 7 Gill & J. (Md.) 421. The majority of the courts now accept the appointment of the receiver as marking the transition. *Squire* v. *Princeton Lighting Co.*, 72 N. J. Eq. 883. An increasing number of modern decisions, however, place the time as early as possible, and adopt the filing of the bill and service of process as the moment of the passing of the property into the custody of the court. *Riesner* v. *Gulf, Colorado & Santa Fé Ry. Co.*, 89 Tex. 656. This last view recognizes that a greater advantage is obtained by keeping the property intact while the court is deliberating as to its disposition, though the bill may finally be dismissed, than by allowing individual creditors more time in which to go against the property.

SHIPPING — LIABILITY OF SHIPPER OF DANGEROUS GOODS. — The defendant, a transportation company, shipped on a common carrier's barge ferro-silicon, billed as "ordinary cargo." The fumes killed the barge-owner and injured his wife. The defendant knew the name of the chemical, but was ignorant of its dangerous qualities. There was no negligence. *Held*, that the wife can recover. *Bamfield* v. *Goole & Sheffield Transport Co.*, [1910] 2 K. B. 94.

A shipper who knows of the dangerous nature of his goods is liable for any damage resulting from his omission to give notice to the carrier. *Boston & Albany R. Co.* v. *Shanly*, 107 Mass. 568; *Farrant* v. *Barnes*, 11 C. B. N. S. 553. But where neither *scienter* nor negligence is alleged, it has been doubted whether a shipper would be liable. *Per* CROMPTON, J., in *Brass* v. *Maitland*, 6 E. & B. 470, 491; LORD ELLENBOROUGH, C. J., in *Williams* v. *East India Co.*, 3 East 192, 200. The decision in the principal case, however, is not without precedent. *Pierce* v. *Winsor*, 2 Spr. (U. S.) 35; *Brass* v. *Maitland*, *supra*. See *Hearne* v. *Garton*, 2 E. & E. 66. The court rested its decision upon the ground that there was an implied warranty that the goods were safe, and that the shipper was liable for damage occurring from a breach of that warranty. This broad rule is unnecessary for the decision of the case. Billing ferro-silicon as "ordinary cargo" constituted a misrepresentation, and for damage resulting from the carrier's reliance on this description, the shipper should be liable. To imply a warranty that the goods are safe is subject to the two objections that it presumes as a fact what may not be the fact, and that it imposes undue hardship on the shipper.

STATUTES — INTERPRETATION — "PERSON OF THE NEGRO OR BLACK RACE." — A statute made concubinage "between a person of the Caucasian or white race and a person of the negro or black race" a felony. *Held*, that an octoroon (or person having one-eighth negro blood) is not a person of the negro or black race within the meaning of the statute. *State* v. *Treadaway*, 52 So. 500 (La.).

Most of the statutory definitions of the word "negro" are broad enough to include an octoroon. CODE OF ALA., 1907, § 2; GEN. STATS. FLA., 1906, § 1. But wherever the question has been considered by the courts independently of statutory definitions, their conclusions have been in accord with the principal case. *Felix* v. *State*, 18 Ala. 720; *Monroe* v. *Collins*, 17 Oh. St. 665. The miscegenation statutes of other states, where there is no arbitrary definition of the word "negro," to include a case like the present, invariably add to "negro" the words "or mulatto," "or person of negro descent to the third generation inclusive," or the like. STATS. KY., 1909, § 4615; REV. STATS. MO., 1899,

§ 2174; CODE OF TENN., 1896, § 4186. That the terms "negro" and "colored person" have been regarded as interchangeable in Virginia is due to the narrow statutory definition of the latter term in that state — "a person with one-fourth or more of negro blood." CODE OF VA., 1873, c. 103, § 2; *Jones* v. *Commonwealth*, 80 Va. 538. The case is not weakened by the court's admission that in ordinary social regulations the word "negro" might receive a different interpretation. *Cf.* PEN. CODE TEX., 1895, §§ 347, 1010. The decision, furthermore, is sustained by the rule that penal statutes are to be construed strictly in favor of the accused. See ENDLICH, INTERPRETATION OF STATUTES, §§ 329–339.

TENANCY IN COMMON — POSSESSION BY ONE TENANT: LIABILITY TO CO-TENANTS FOR USE AND OCCUPATION. — In partition proceedings between tenants in common, a claim for rent was made against one of the parties, who had occupied the premises alone, but without unlawful exclusion of his co-tenants, and under no agreement as to rent. *Held*, that the claim should be denied. *Field* v. *Field*, 8 East. L. Rep. 374 (Prince Ed. Is., Ct. Ch.).

At common law, if one tenant in common occupied all the land, a co-tenant had no remedy unless he had been ejected or had appointed the other his bailiff. COKE LIT. 199 b. By statute of 4 Anne, c. 16, § 27, an action was allowed against a co-tenant "for receiving more than comes to his just share or proportion." But as construed in England and some states, this applies only when rent or other profit is received from a third person. *Henderson* v. *Eason*, 17 Q. B. 701; *Badger* v. *Holmes*, 72 Mass. 118. The decision in the principal case is in accord with the prevailing view. *Israel* v. *Israel*, 30 Md. 120; *Reynolds* v. *Milmeth*, 45 Ia. 693. But by statute in some states, and by judicial decision in others, a sole occupying tenant is liable for use and occupation. R. I. GEN. LAWS, 1909, c. 337, § 1; *Gage* v. *Gage*, 66 N. H. 282. Considerations of fairness commend this result. According to the legal conception of tenancies in common, however, each co-tenant has a right to every part of the common property. If one is left in sole possession, therefore, he does not exceed his rights in occupying the whole.

TRADE SECRETS — REMEDIES FOR DIVULGENCE. — The plaintiff, who owned a secret formula for making medicine, agreed to tell the secret to the defendant and to use the medicine in his sanitarium. In return the defendant promised to keep the formula secret and to pay the plaintiff certain wages and a commission. The defendant divulged the formula. *Held*, that the plaintiff can recover in tort. *Roystone* v. *Woodbury Institute*, 67 N. Y. Misc. 265 (Sup. Ct.).

The duty to refrain from divulging trade secrets is imposed by law as an incident to any confidential relationship. *Morison* v. *Moat*, 9 Hare 241; *Abernethy* v. *Hutchinson*, 3 L. J. Ch. 209, 219. An express promise of secrecy would seem but an iteration of the duty already existing, and of itself, therefore, no legal consideration to support a promise in return. See *Thum Co.* v. *Tloczynski*, 114 Mich. 149, 157. But if there is further and sufficient consideration, a contract of secrecy gives but an alternative remedy. *Peabody* v. *Norfolk*, 98 Mass. 452, 460. See MECHEM, AGENCY, § 476. From the nature of the right protected, relief is generally sought in equity. The failure of the courts to point out clearly whether the basis of equitable relief is by way of injunction to prevent a breach of the relational duty, or of specific performance of the valid contract between the parties, has led to confusion as to the nature of the right. *Morison* v. *Moat*, *supra*. See 11 HARV. L. REV. 262; 20 *id.* 143. The main case recognizes that the right does not necessarily rest upon contract, but exists as an incident to a confidential relationship.

WATERS AND WATERCOURSES — TIDAL WATERS — RIGHT OF FEDERAL GOVERNMENT TO IMPROVE NAVIGATION. — The defendant was under con-

tract with the United States government to dredge a channel in navigable waters. The submerged land, title to which was derived from an early colonial patent, had been leased to the plaintiff, and was being used by it as an oyster bed. *Held*, that the defendant cannot be restrained from proceeding under his contract, and that the plaintiff is not entitled to compensation. *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 91 N. E. 846 (N. Y.).

The title conveyed by the early grant from the king under which the plaintiff claimed was necessarily subject to the public right of navigation. See HALE, DE JURE MARIS, 1 HARGRAVE'S TRACTS, 36. The government of the United States succeeded to the control of navigation, hence all submerged land is held subject to this servitude. *Gibson* v. *United States*, 166 U. S. 269. It follows that there is no taking of property entitling to compensation, if, in the exercise of this right, the flow of the water is diverted, or its level raised so as to diminish the value of the land. *South Carolina* v. *Georgia*, 93 U. S. 4; *Crocker* v. *Champlin*, 202 Mass. 437. It is also generally held that the government may use even the submerged land itself to accomplish its purpose. *South Carolina* v. *Georgia*, *supra*. Such cases, however, could usually be based on the rule "*de minimis non curat lex*. See *Bent* v. *Emory*, 173 Mass. 495. But on the theory that the right to improve navigation necessarily includes the right to use the submerged land itself for that purpose, the weight of authority holds in accordance with the principal case that the rule as to compensation is the same even when substantial damage is done. *Lane* v. *Smith*, 71 Conn. 65. *Contra*, *Bent* v. *Emory*, *supra*.

BOOK REVIEWS.

INTERNATIONAL LAW. By George Grafton Wilson and George Fox Tucker. Fifth edition. New York: Silver, Burdett and Company, 1910. pp. xix, 505.

HANDBOOK OF INTERNATIONAL LAW. By George Grafton Wilson. St. Paul: West Publishing Company. 1910. pp. xxiii, 623.

These two books, largely by the same author, present the elementary doctrines of international law briefly and adequately. Each volume gives in an appendix the more important documents, from the Declaration of Paris, 1856, to the Declaration of London, 1909, including the Hague Conventions of 1907. In selection and order of topics treated in the text, the two works resemble each other. The chief diversity is that the larger volume gives rather numerous extracts from treaties and judicial opinions.

As international law still stands outside the ordinary lawyer's circle of studies, and must continue so to stand as long as its doctrines are indefinite or are not cognizable in national courts or in international tribunals of a distinctly judicial nature, the lawyer's chief interest in these volumes, which exhibit the subject in its latest development, is to ascertain to what extent international law has now become lawyer's law. The larger work, by presenting the leading principles in blackletter type, facilitates this inquiry, and seems to indicate that at least one-fifth of the subject has reached a condition which a lawyer must concede to be within the jurisdiction of lawyers and of courts.

Perhaps it will be well to give examples. A principle which cannot be called lawyer's law, but which must be stated in a treatise on international law, is: "The breaking of diplomatic relations is an evidence of strained relations between states, and is often the step preceding war." (Handbook, 229.) An example of a principle which any lawyer would call a proposition of law is:

"In order to incur liability for its breach, a neutral must have knowledge of the existence of a blockade." (Handbook, 444.)

To determine whether a principle is properly to be termed a proposition of law is not always easy, and it may be that the estimate of one-fifth would not gain unanimous approval; but it is certain that already a very considerable part of the subject is real law, that the documents in the appendices to these two volumes, as far as recognized by nations, are similar to statutes, that the decisions of national courts as to citizenship, prize, and other topics are similar to other judge-made law, that future international agreements and also decisions of international judicial tribunals will add similar matter, and that by and by international law will cease to be challenged when it seeks a place in the circle of legal science. For the present, only here and there will a lawyer pay attention to the subject; and that occasional lawyer will find either one of these volumes well adapted to his use.

A Pocket Code of the Rules of Evidence in Trials at Law. By John Henry Wigmore. Boston: Little, Brown and Company. 1910. pp. liii, 566. 16mo.

Professor Wigmore's four-volume "Treatise on the System of Evidence," which appeared in 1904–1905, was characterized by its reviewer in these pages as the "most complete and exhaustive treatise on a single branch of our law that has ever been written." The volume now under review is in the nature of a concise summary of the rules developed by the larger work, omitting the historical and theoretical chapter introductions of the latter, but maintaining in large degree its general characteristics and analysis. The peculiarity of Professor Wigmore's analysis and the oddity of his terminology were commented upon in a prior review. 18 Harv. L. Rev. 478. The general practitioner who has culled his knowledge of the law of evidence from Stephen and Greenleaf feels ill at ease in reading of such monstrosities as "autoptic proference," "prophylactic rules," or "viatoral privilege." The author persists in the use of these unfamiliar terms, though they provoked much objection both in his notes to his edition of Greenleaf and in the larger "Treatise." Yet, as the "Treatise" has already established itself as the master authority on the law of evidence, so, in spite of its idiosyncrasies, the present "Code" must inevitably prove a most useful work of a type *sui generis*.

The author's object is twofold: "to provide the practitioner with a handy summary of the existing rules of evidence; and at the same time to state them in a scientific form capable of serving as a code." It is in the former capacity that the volume will prove most useful to the profession. Concise in statement, with a careful system of cross-referencing to bring out the many rules potentially applicable to a given problem, and with a thorough index, it is a handy tool for the hurried lawyer in the court-room. In form the "Code" is more like the familiar "Digest" of Sir J. F. Stephen than the shorter modern works — such as Hughes — intended for the student as well as for the practitioner. Though it does not purport to theorize, it reflects through an easily understood system of brackets the sometimes questioned opinions of the author as to "what is not yet the law anywhere but ought to be" and "what is the law in every jurisdiction but ought not to be law." The same typographical device is used to indicate the variances in the rules of different jurisdictions.

The present edition contains citations only to the author's more extensive treatise, providing by alternate blank pages space for annotations of decisions and statutes in the particular jurisdiction of the owner. A series of completely annotated "Local Editions" is promised: these will be awaited with eagerness.

The workmanship of the volume deserves special commendation. Printed on an excellent quality of thin paper, gilt-edged and bound in flexible black morocco, the "Code" is a most attractive pocket companion. R. T. S.

THE PEOPLE'S LAW, or POPULAR PARTICIPATION IN LAW-MAKING. A study in the Evolution of Democracy and Direct Legislation. By Charles S. Lobingier. New York: The Macmillan Company. 1909. pp. xxi, 429.

This is a timely work. It is the outgrowth of a careful scholar's investigation into the validity of some recent American state constitutions proclaimed without ratification by the people. The work bristles with citations, footnotes, transcripts from ancient documents, and might repel the reader unwilling to wander in what might strike him as merely another weary waste of academic discussion. But although purely judicial in tone, the book contains much of the greatest encouragement to the lover of American traditions, and leads to a strengthened faith in the doctrine of the sovereignty of the people. It shows from historical sources previously little explored the abiding character of the demand for government by consent. It implies irresistibly the necessity for direct popular participation in law-making if the blessings of permanence and tranquillity are to be secured. Professor Howard well says in the introduction that the evolution traced by Professor Lobingier "yields many a lesson of vital import to those seriously interested in the welfare of American society."

Though the academic interest attaching to this book would be quickly appreciated by any thoughtful reader, its striking timeliness is especially realized by those familiar with the rapidly strengthening but widely misunderstood movement for the initiative and referendum in our cities and states. Professor Lobingier's work supplies a historical setting and background for this movement of a most impressive character to which its friends and foes alike may be directed to their advantage.

The book derives its vital character not only from the vitality of the subject — the study of the source of authority in government — but from the painstaking fidelity with which the work has been done. The author keeps himself very much in the background and makes great masses of original documents and records speak for themselves. He calls attention to the fact that governments were originally "more or less popular, succeeded by a monarchical and then a delegate system which, in turn, are supplanted by one completely direct and popular." He then states that his principal theme is "to show in detail how this cycle, so far as completed, has been accomplished."

One can hardly see that a cycle has been accomplished or for the indefinite future is likely to be, unless the present large units of population, cities, states, and nations are to undergo dispersion and subdivision.

It can hardly be admitted that we are nearing the finish of a cycle. We need not accept so dispiriting a figure as that. Might it not better be said that we are completing a turn of a spiral of human development and are coming more universally than ever to an acceptance of the principles of the folk-moot of the early tribes as a foundation? Certainly we are accepting and utilizing them at a much higher level, thanks to the acquirement, among many other things, of universal education, improved means of communication, and the principle of representative government. For all of these permit the massing of humanity for the purposes of government in ever greater and greater units, which if accompanied with proper regard to local interests, must be regarded as in the line of substantial and permanent progress.

To the reviewer it does not, after all, seem so much a cycle which the author has traced as a rigorous and triumphant evolution of an imperishable and un-

quenchable human aspiration, the love of liberty and self-government, based largely, whether consciously or not, in the faith that the legitimate interests of the individual are not only perfectly compatible with the good of all, but will in the long run receive a degree of stable support, if the masses are actually in control of their own affairs, which cannot be otherwise attained.

The plan and arrangement of the book may be briefly outlined as follows. At the outset attention is called to the popular assembly or folk-moot as "one of the conspicuous features of the public life of early Aryan peoples." The author then rapidly traces the survivals of law-making by such assemblies through the centuries up to the time of the Reformation, when he shows the great impetus given the institution through the church covenants of that time. After having thus taken firm root in Great Britain, popular ratification of public law became a more or less clearly developed principle in all the American colonies, particularly in New England, where a pure democracy was realized and has been retained in the town meetings. This takes up the first third of the book. Considerably more space still is there devoted to a survey of popular constitution-making in the United States, and the remainder of the book, about a sixth of it, is given up to a very condensed account of popular participation in ordinary law-making both in the United States and elsewhere, including the Scandinavian countries, France, Italy, Latin America, and Australia. The experience of the last fifty years in Switzerland is practically ignored, for the somewhat astonishing reason that "it could not be adequately treated in less than a volume and no review of it will be attempted here." However this may be, one cannot help wishing something of it might have been included, or that Professor Lobingier may some time favor us with the special volume which it may be agreed it deserves.

There is a copious bibliography, but among the works on Switzerland one notes at once the omission of the works of Keller, Th. Curti, and Stüssi.

A reader wishing to get the gist of the work may well read the chapter (chap. xxvi) recapitulating the result of popular constitution-making in the United States. Objections often offered by theorists to such practices are there crushingly answered — and more yet might be added from some of the most recent American methods of acquainting voters with the merits of measures submitted to them. Few readers would, however, lay down the book on concluding this chapter. There is much to tempt and repay them, both in the chapters preceding this fine summary and in the subsequent chapters.

In conclusion it may simply be reasserted that this work is one of great value and encouragement to the lover of American traditions and ideals who wishes to see them advance to a more perfect fruition. It should be carefully read by any student of the modern tendency toward direct legislation.

L. J. J.

General Theory of Law. By N. M. Korkunov. Translated by W. G. Hastings. Boston: The Boston Book Company. 1909. pp. xiv, 524.

The title is somewhat misleading. A large part of this book is given up to the history of conceptions of law, before the author evolves the theory satisfactory to him and proceeds with its application.

The student at the usual American law school, and of course the lawyer in practice, consider specific laws in their application to actual cases, and are not usually led to concern themselves very deeply with any preliminary philosophical "whys" and "wherefores." Sometimes, however, when student or lawyer has reduced some principle apparently to its lowest terms, he finds himself brought face to face with premises, assumed as axioms for the usual purposes of his discussion, which yet do not seem wholly satisfactory. In the first book of this work, under the heading "Conceptions of the Law," theories as to the

fundamental nature of law, adopted by various writers, are considered in their logical and historical aspects. The point of view is broad and undidactic. In the rapidity and clearness of this analysis lies, as it seems to the reviewer, the greatest value of the "General Theory of Law." Although the reader is introduced to writers on legal theory, some of whom must be known only by name, if at all, he discovers that many of their doctrines have a familiar ring in his ears. Some of these doctrines he may find that he has himself unconsciously adopted. To know what place they occupy in the history of legal theory cannot fail to be valuable and interesting; it may also be surprising, and not wholly gratifying.

So far as a definition of law can be contained in a phrase, the one at which the author eventually arrives in the course of his historical discussion is that law is the "delimitation of interests." In the second and third books are treated such large social forces as enter into this delimitation. Since the greater part of the author's concern is with the elements which determine the rules, rather than with the interests themselves, the student or lawyer trained in specific instances feels in his footing a little unsteadiness, which is not diminished by the fact that many of the illustrative examples — and their entire number is not too numerous — are unfamiliar.

The last book, entitled "Positive Law," contains more of the sort of material included in the usual works on "Jurisprudence," — how actual legal conditions meet the test of theory. Since a Russian is the author, and the book is for Russian students in the first place, particular attention is naturally paid to Russian law.

Whether or not the author is followed in all his surprisingly ingenious theories, the reader will find many detached paragraphs and statements most stimulating to his imagination. For example, when the author, in pointing out the line of demarcation between morality and law, says: "Morality furnishes the criterion for the proper evaluation of our interests; law makes out the limits within which they ought to be confined. To analyze out a criterion for the evaluation of our interests is the function of morality; to settle the principles of the reciprocal delimitation of one's own and other people's interests is the function of law."

The translator's task has obviously been an exceedingly difficult one. Much of the literature of legal theory has been in foreign tongues. Many words and phrases have acquired a technical meaning, which cannot be reproduced by literal translation. Professor Korkunov has not confined himself to Russian for his vocabulary. The equivalents adopted by Professor Hastings, though sometimes strained and unusual, are not lengthy paraphrases. For this reason, and because the labor of the translator seems to have been a labor of love, the text is easy and pleasant to read, and does not exhaust the attention.

A. T. W.

A Manual of Medical Jurisprudence. By Marshall D. Ewell. Second Edition. Boston: Little, Brown, and Company. 1909. pp. x, 407.

In this book, the first edition of which was published in 1887, the author presents a general survey of the field of medical jurisprudence. The leading topics of the science are treated with a reasonable degree of completeness, excepting only the topics of insanity and toxicology. Of these only outlines are attempted on account of lack of space. The author states principles clearly and develops them with sufficient fullness to make the book useful as an introduction to the subject or as a means of review. Except as an introduction, an attorney might have little occasion to use it; for in the trial of cases depending on matters connected with medicine or surgery, he would often want a fuller treatment of the special branch involved, while the legal information is of rather a general nature.

The changes in the second edition made to conform with the present state of the science are comparatively few. One would expect, for example, to find some mention of the medico-legal bearing of the X-rays. At the end of each chapter references have been added, and in the bibliography the most recent and exhaustive treatises are included. The book seems admirably adapted for the use of students. R. T. H.

PRACTICAL SUGGESTIONS FOR DRAWING WILLS AND THE SETTLEMENT OF ESTATES IN PENNSYLVANIA. By John Marshall Gest. Philadelphia: T. & J. W. Johnson Company. 1909. pp. xx, 152.

The writer apologetically prefaces his work with the remark of Lawyer Thompson in the Ordeal of Richard Feverel: "Ours is an occupation which dries the blood." And, indeed, the title suggests the very humdrum of law practice, — the labored efforts of the scrivener and the routine processes of administration. But the author's work belies his own confession. On the dullest subjects its pages are illuminated by quaint illustrations drawn from Coke's Littleton, and the Doctor and Student, and other old masters in the law. The author combines the lore of the antiquary with the practical wisdom of experience. A subtle humor pervades his exposition of the most formal doctrines of the law, but the humor of the author nowhere rules his thought. The book is truly unique in that, while written in a lighter vein, it is of unusual accuracy and practical value. The chapter on drawing wills points out, as can only be done by an experienced guide, the many pitfalls that beset the path of the unwary testator, and his lawyer as well. The chapter on the settlement of estates shows a singularly intimate acquaintance with the practice in that field. The book as a whole is so well written that it is hoped that the fact that it is concerned with purely local law will not prevent it from enjoying the general circulation which it merits. H. F. S.

A TREATISE ON THE LAW OF FIDELITY BONDS. By M. Barratt Walker. Baltimore: King Brothers. 1909. pp. xv, 287.

The scope of this work is very limited and the main principles of the law of suretyship are not touched upon. The author confines himself within the narrow bounds suggested by the title. Within the walls of the subject treated the book is rather a collection of cases arranged under appropriate heads and subheads, than a work in which the underlying principles of the law bearing on the subject are set forth. Indeed the author says that "most of the text is in the words of the law" and "very little in deduction or opinion by the author." This plan the writer has carried out literally, and there are long excerpts from opinions and numerous cases are cited with very little comment to point out their application. The book is rather a collection of briefs on the various topics treated with well-selected cases as authorities. As such, its use is very limited and its value will decrease as new cases are adjudicated by the courts. S. ST. F. T.

A TREATISE ON THE LAW OF LABOR UNIONS. By W. A. Martin. Washington: John Byrne and Company. 1910. pp. xxv, 649.

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WILSON ON INTERNATIONAL LAW. By G. G. Wilson. St. Paul: West Publishing Company, 1910. pp. xxi, 482.

WORK ACCIDENTS AND THE LAW. By Crystal Eastman. New York: Charities Publication Committee. 1910. pp. xvi, 345.

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POWERS OF REGULATION VESTED IN CONGRESS.

THE past few years have made acute the conflict respecting the relative legislative powers of state and nation. This, no doubt, is largely due to the fact that only recently has any determined effort been made to secure the exercise by Congress of its full powers over commerce and the instrumentalities thereof; and this oversight or lack of initiative on the part of our legislators has led to legal confusion which will probably continue until the opportunity is offered for having the full constitutional powers of the National Congress clearly defined by the highest judicial authority.

The commercial growth and expansion of the United States is unprecedented in the history of nations. In the course of this wonderful commercial development, many legal problems have arisen which urgently call for solution. With this expansion have come new rights which loudly call for protection, and with it, too, abuses which no less loudly demand a remedy. Whenever unusual situations present themselves, it is at once thought that the existing laws are inadequate to meet the changed conditions, and new legislation is forthwith demanded.

Such demand requires due thought and thorough consideration of the relations of citizens to each other, the relations of the people to property, and the relations of government to both. It is contrary to the genius of our institutions, and the best interests of the people, that the government should control the ownership and management of the business of the country; yet it is the undoubted right, and should be the duty, of the government, to supervise

wisely the commercial relations of its citizens. To reach a sane solution of this complex question involves a consideration of federal laws and their relation to state laws, and brings up for discussion the question of the powers of regulation vested in the national Congress. By powers of regulation, I have in mind the ability of Congress to deal with all subjects of national concern, whether such powers be expressly granted by, or fairly implied within, the Constitution.

In the solution of any question involving the powers conferred by the Constitution resort must be had to interpretation of that instrument. The Constitution does not expressly delegate to Congress "regulatory" powers as that term is now commonly accepted. Such authority must be found in "construction," and "construction" always engenders opposition — in fact no radical legislation of national import has ever been enacted without encountering the challenge of unconstitutionality. New legislation, and new application of existing legislation, are therefore certain to be the subject of searching judicial inquiry.

The powers of regulation which are here treated are not limited to any specific form, but have application to various situations, to which changed conditions have given rise. It happens that the changes have been largely commercial and industrial, and therefore the questions necessarily have reference to these subjects.

I. Articles of Confederation and the Constitution.

To determine the application of law, its genesis is necessarily the first point in logical order.

Prior to the Constitution and after the United States had declared themselves free and independent, there was entered into what was called the "Articles of Confederation and Perpetual Union between the thirteen original Colonies."

The purpose of this Confederation was practically limited to a friendly arrangement between the *states*, without yielding any of the sovereignty, independence, powers, or substantial rights of any state. There was no merger of state interests into the Confederated United States of America, and there was no provision accepting the sovereignty of the United States of America over the citizens or

the powers of the respective states. In other words, it was merely intended by these several states to establish a political offensive and defensive compact, without yielding any of their independence or sovereignty.

It was soon found that this Confederation did not serve to form a strong central government. Instead, the conflicts and competition arising between the people of the different states invited a spirit of unfriendliness and disunion. To assure a government to advance and protect the people of all the States effectively, a new fundamental contract, namely, the Constitution of the United States, was adopted. That contract, as will be observed, was not a *compact* of the *various states* but of the *people of the United States*, as will be seen from the Preamble, which reads:

"We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

A reading of the Articles of Confederation and the Preamble of the Constitution shows clearly the wide difference in the purpose of the two instruments. The Confederation was a "loose league of friendship"; the Union created by the Constitution is an indissoluble entity under that fundamental contract which is self-contained and self-executing.

II. The General Powers of Congress.

Though perhaps unnecessary, it is well to call attention to the provisions of the Constitution which established once and for all time the relationship of the states to the Union, and determined forever where lay the supremacy of power. Paragraph 2 of Article VI, the clause of authority, reads:

"This Constitution and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Whenever Congress acts within its powers under the Constitution, that act has the force of law and binds the people and every state of the United States.

Ever since the Constitution was adopted it has been insisted that it should have strict construction. Chief Justice Marshall, however, in the case of Gibbons *v.* Ogden,[1] involving the power of Congress to regulate commerce, commenting on this contention that the Constitution should be strictly construed, said:

"This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means of carrying all others into execution, Congress is authorized 'to make all laws which shall be necessary and proper' for the purpose. But this limitation on the means which may be used is not extended to the powers which are conferred; nor is there one sentence in the Constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it."

The tendency, characteristic of a non-progressive spirit, is to solicit an interpretation of the Constitution that will exclude from its protection and application any subject that may be new, instead of seeking a construction which will enable Congress to deal with it as fairly within the spirit and the scope of the Constitution. No charter drawn for the guidance of a great nation, the development of which it was utterly impossible to discern in advance, could undertake to provide in express terms for every future contingency. It must necessarily have been framed in general terms and depend upon interpretation for its application to changing conditions.

Mr. Justice Story in the case of Martin *v.* Hunter's Lessee [2] uses language prophetic of the future, and indicative of the power of the people under the Constitution to meet and deal with the important and all-absorbing questions of the day. He says:

"The Constitution unavoidably deals in general language. It does not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specification of its powers, or to declare

[1] 9 Wheat. (U. S.) 1. [2] 1 Wheat. (U. S.) 304.

the means by which these powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers as its own wisdom and the public interests should require."

From time to time Congress has undertaken to enact legislation deemed necessary for the advancement and development of the nation. Such enactments have not been limited to subjects specifically delegated by the Constitution to Congress, but included those necessary to meet new conditions. For instance, the Constitution did not in terms authorize Congress to legislate upon matters of banks or banking, and yet Congress did authorize the organization of the United States Bank; and in McCulloch *v.* Maryland[3] Chief Justice Marshall, in upholding the constitutionality of this legislation, said:

"Although, among the enumerated powers of government, we do not find the word 'bank' or 'incorporation,' we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government."

In further answer to the argument against the power of Congress to create a corporation, that great jurist, continuing, said:

"On what foundation does this argument rest? On this alone: The power of creating a corporation is one appertaining to the sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for per-

[3] 4 Wheat. (U. S.) 316.

forming its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

"The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception."

And in conclusion:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Since that decision, the National Banking Act was adopted by Congress, and under it a system of banking has been established which has withstood every trial and all the vicissitudes of time and circumstance. Congress, too, has enacted regulatory legislation with respect to pensions, crimes and misdemeanors, pure food, lighthouse and life-saving service, and numberless other matters, without in any case finding any specific provision therefor in the Constitution.

Congress has dealt with these conditions, in the absence of such specific grant of power because the public interest required it, and because fairly and reasonably such enactments were within the scope and spirit of the Constitution.

III. The United States a Commercial Nation.

The United States is essentially a commercial nation. The framers of the Constitution seem to have looked far into the future. They evidently recognized that the great opportunities for national development lay in commerce. The foundation therefor was firmly established in the charter. In the broadest possible language, the Constitution delegated to Congress the power to deal with the subject, in the following words:

"The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The commercial growth of the nation depended upon the development of the instrumentalities of commerce. The country and the people proved equal to the situation. Thousands of miles of railroads were constructed, making it possible to populate and develop all parts of the United States. Telegraph companies and telephone companies brought the people in almost instantaneous communication from ocean to ocean. Interurban railroads contributed their share to the settlement of the country, as did steamship and other water transporation companies. The United States mails, as well as the express companies, made it possible for the people in distant States to transact business and exchange communications with freedom and with convenience. These different means of transportation, intercourse and communication — each a distinct instrumentality of commerce — together constitute the great arteries of business through which the nation's future greatness under the guidance of Congress was assured under the Constitution.

The courts when called upon to give construction to the commerce clause of the Constitution have from the beginning not only recognized its vital importance, but have constantly given construction thereto which has for all time settled the right of Congress, and of Congress alone, to deal with the subject of interstate commerce.

IV. The Commerce Clause.

The leading case on the commerce clause of the Constitution is Gibbons *v.* Ogden,[4] wherein the great cardinal principles of this branch of constitutional law are forcibly expressed by Chief Justice Marshall. In answer to the inquiry, "What is this power?" he said:

"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and

[4] 9 Wheat. (U. S.) 1.

acknowledges no limitations, other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

Mr. Justice Bradley (of the Supreme Court, sitting as a circuit judge), in the case of Stockton *v.* Baltimore & N. Y. R. Co.,[5] in discussing the power to regulate commerce free from interference by the states, says:

"Still it is contended that, although Congress may have power to construct roads and other means of communication between the states, yet this can only be done with the concurrence and consent of the states in which the structures are made. If this is so, then the power of regulation in Congress is not supreme; it depends on the will of the states. We do not concur in this view. We think that the power of Congress is supreme over the whole subject, unimpeded and unembarrassed by state lines or state laws; that, in this matter, the country is one, and the work to be accomplished is national; and that state interests, state jealousies, and state prejudices do not require to be consulted. In matters of foreign and interstate commerce there are no states."

In the case of *In re* Debs[6] — very instructive upon the powers of the federal government under the Constitution — the Supreme Court, speaking through Mr. Justice Brewer, said:

"What are the relations of the general government to interstate commerce and the transportation of the mails? They are those of direct supervision, control, and management. While, under the dual system which prevails with us, the powers of government are distributed between the state and the nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the state. . . .

"Constitutional provisions do not change, but their operation extends to new matters, as the modes of business and the habits of life of

[5] 32 Fed. 9. [6] 158 U. S. 564.

the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel; yet in its actual operation it touches and regulates transportation by modes then unknown — the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

Comparatively recent is Champion *v.* Ames [7] (the Lottery case), where the Supreme Court, speaking through Mr. Justice Harlan, in referring to former expressions of the court on this subject, says:

"They show that commerce among the states embraces navigation, intercourse, communication, traffic, the transit of persons and the transmission of messages by telegraph. They also show that the power to regulate commmerce among the several states is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject *only* to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted, Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed."

It will be observed that the power of Congress to deal with interstate commerce is exclusive and is prohibitory of any exercise of legislative action or control by the states. The rule with reference to legislative control over interstate commerce is not limited to corporations. It is just as applicable to and enforceable against individuals, firms, partnerships, and other forms of business associations, which undertake to engage in interstate commerce.

The relative powers of the federal government and the states over the commerce of the country have been clearly defined by the Supreme Court, and this is nowhere better illustrated than in its decisions with reference to foreign corporations.

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[7] 188 U. S. 321.

If from the expressions of the Supreme Court in the very early case of Bank of Augusta *v.* Earle,[8] or the subsequent case of Paul *v.* Virginia,[9] or in the recent case of Security Mutual Life Insurance Co. *v.* Prewitt,[10] any doubt has existed as to the unqualified supremacy of the federal laws over the laws of the several states with reference to matters committed to Congress by the federal Constitution, such doubt has been completely dispelled by the decisions of the Supreme Court of the United States handed down at the last term of court in the cases of Western Union Telegraph Co. *v.* Kansas, decided January 17, 1910; Pullman Co. *v.* State of Kansas, decided January 31, 1910; Southern Railway Co. *v.* Greene, decided February 21, 1910, and Herndon *v.* Chicago, Rock Island, & Pacific Ry. Co., decided May 31, 1910.

The broad doctrine announced by the Supreme Court in Bank of Augusta *v.* Earle, *supra*, speaking of the rights of a foreign corporation, "It must dwell in the place of its creation and cannot migrate to another sovereignty," was thus elaborated and emphasized in Paul *v.* Virginia, *supra:*

"The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states — a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

The opinion in this case was by Mr. Justice Field.

In the later case of Pensacola Telegraph Co. *v.* Western Union Tel. Co.[11] the court very materially modified the opinion theretofore expressed in Paul *v.* Virginia, basing its modification or change of opinion upon the ground that the question of interstate commerce was not there involved, saying:

[8] 13 Pet. (U. S.) 519.
[9] 8 Wall. (U. S.) 116.
[10] 202 U. S. 246.
[11] 96 U. S. 1.

"We are aware that, in Paul *v.* Virginia, 8 Wall. 168 (75 U. S., XIX, 357), this court decided that a state might exclude a corporation of another state from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that 'The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.' Art. IV, sec. 2. That was not, however, the case of a corporation engaged in interstate commerce; and enough was said by the court to show that, if it had been, very different questions would have been presented. The language of the opinion is, p. 182 (361): 'It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. . . . This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations and corporations. . . . The defect of the argument lies in the character of their [insurance companies'] business. Issuing a policy of insurance is not a transaction of commerce. . . . Such contracts [policies of insurance] are not interstate transactions, though the parties are domiciled in different states.'"

It is worthy of note that Mr. Justice Field, who wrote the opinion of the Supreme Court in Paul *v.* Virginia, wrote a strong dissent in this case, largely based upon the former expressions of the court in Bank of Augusta *v.* Earle, and Paul *v.* Virginia.

In Security Mutual Life Insurance Company *v.* Prewitt, *supra*, an insurance company of New York had been admitted to the right to transact business in the state of Kentucky. The state exacted as one of the conditions imposed upon a foreign corporation doing business within its borders that it waive its right to remove cases arising in the state court to the federal court. The Supreme Court held that no question of interstate commerce being involved, the refusal of the State to permit the insurance company to continue to do business because of its removal of a case arising in the state court to the federal court was not in violation of the federal Constitution. In this case a strong dissenting opinion was filed by Mr. Justice Day, concurred in by Mr. Justice Harlan. The dissenting opinion very thoroughly reviewed and analyzed the prior decisions of the court upon the subject involved, and held that the right of the company to continue to do business in Ken-

tucky could not be made to depend upon the willingness of the company to surrender a right guaranteed to it under the federal Constitution, whether such company be engaged in interstate commerce or not.

V. The Latest Adjudications.

By the decisions of the Supreme Court in Western Union Telegraph Company *v.* Kansas, and the Pullman Company *v.* Kansas, no doubt further exists and no room for argument remains, with reference to the want of power in the states to regulate or interfere, directly or indirectly, with interstate commerce; whether such is undertaken by requiring foreign corporations engaged in interstate commerce to seek the assent or permission of the state to transact business therein, or by the exercise of the taxing power by the state, ostensibly to reach only intrastate business.

In Western Union Telegraph Company *v.* Kansas,[12] the court say:

"We repeat that the statutory requirement that the telegraph company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given per cent of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce, and its privilege to engage in that commerce, in that it makes both such commerce, as conducted by the company, and its property outside of the state, contribute to the support of the state's schools. Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise, is to allow form to control substance. It is easy to be seen that if every state should pass a statute similar to that enacted by Kansas, not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified, and the business of the country thrown into confusion, but each state would continue to meet its own local expenses not only by exactions that directly burdened such commerce, but by taxation upon property situated beyond its limits. We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done, or can generally be better and more economically done, by such interstate companies rather than by domestic companies organ-

[12] 216 U. S. 1.

ized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammeled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the states to regulate their strictly domestic affairs is fundamental, in our constitutional system, and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the general government, and not in hostility to rights secured by the supreme law of the land."

And, again, at page 206:

"The right of the telegraph company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that state, which was hostile both to the letter and spirit of the Constitution. The company was not bound, under any circumstances, to surrender its constitutional exemption from state taxation, direct or indirect, in respect of its interstate business and its property outside of the state, any more than it would have been bound to surrender any other right secured by the national Constitution."

In the case of Pullman Company *v.* Kansas,[13] the court say:

"We hold: 1. That the Pullman Company was not bound to obtain the permission of the state to transact interstate business within its limits, but could go into the state, for the purposes of that business, without liability to taxation there with respect to such business, although subject to reasonable local regulations for the safety, comfort, and convenience of the people which did not, in a real, substantial sense, burden or regulate its interstate business, nor subject its property interests outside of the state to taxation in Kansas. 2. That the requirement that the company, as a condition of its right to do intrastate business in Kansas, should, in the form of a fee, pay to the state a specified per cent of its authorized capital, was a violation of the Constitution of the United States, in that such a single fee, based as it was on all the property interests, and business of the company, within and out of the state, was, in effect, a tax both on the interstate business of that company, and on its property outside of Kansas, and compelled the company, in order that it might do local business in Kansas in connection with its interstate business, to waive its constitutional exemption from state taxation on its interstate

[13] 216 U. S. 56.

business and on its property outside of the state, and contribute from its capital to the support of the public schools of Kansas; that the state could no more exact such a waiver than it could prescribe as a condition of the company's right to do local business in Kansas that it agree to waive the constitutional guaranty of the equal protection of the laws, or the guaranty against being deprived of its property otherwise than by due process of law."

Mr. Justice Holmes dissented in Western Union Telegraph Company *v.* Kansas, *supra*, and in his dissenting opinion called attention to the effect of the decision upon the expressions of the court in the earlier cases in the following language:

"I am aware that the battle has raged with varying fortunes over this matter of unconstitutional conditions, but it appears to me ground for regret that the court so soon should abandon its latest decision, Security Mut. L. Ins. Co. *v.* Prewitt, 202 U. S. 246."

The whole question of the relative powers of the federal government and the states under the federal Constitution has received a renewed and exhaustive consideration. The court reviewed all its previous expressions, resulting in substantially overruling the broad doctrine laid down in the Bank of Augusta *v.* Earle, and Paul *v.* Virginia; and under the lead of Pensacola Telegraph Co. *v.* Western Union Telegraph Co., and the dissenting opinion in the case of Security Mutual Life Insurance Co. *v.* Prewitt, establishes the unquestioned supremacy of federal laws over state laws in any conflict between the law-making power of the states and the Union, upon any subject embraced within the federal Constitution. There is also established in these recent cases the rule that corporations engaged in interstate commerce, as well as individuals, are entitled to the equal protection of the laws and in a position to invoke the protection of the Fourteenth Amendment. This was held in Southern Railway Company *v.* Greene,[14] in the following language:

"We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the state does violence to the federal Constitution."

[14] 216 U. S. 400–404.

VI. The Enumerated Powers of Congress.

There can be no doubt of the intention of the framers of the Constitution in seeking to vest Congress with a broad control and power of regulation over the people and the affairs of the nation.

In addition to the Commerce Clause, let me draw attention to the various other enumerated powers specifically vested in Congress by the Constitution, dealing with vital conditions and governmental functions:

The powers (1) to coin money, regulate the value thereof, and of foreign coin, and to fix the standard of weights and measures; (2) to establish post-offices and post roads; (3) to establish uniform laws on bankruptcy throughout the United States; (4) to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and the general welfare of the United States; (5) to borrow money on the credit of the United States, and (6), under the general powers, as decided by the Supreme Court of the United States in the case of McCulloch *v.* Maryland, to establish national banks.

Each of these enumerated powers is full and complete over the subject matter of the grant. Taken together, they constitute a strong, virile system of governmental regulation of the interstate and foreign commerce of the country. Within the comprehension of these powers, Congress can effectively regulate all the complex business relations of the people and promote the growth and development of the commerce of the nation.

Every citizen in every walk of life, whether he be farmer, merchant, manufacturer, artisan, or banker, has need to use some of the agencies or instrumentalities within the power of Congress to regulate, be it a railroad, or a steamship; the telegraph or the telephone; mails, or banks. That being so, no business of any moment can be conducted in this country by individuals, by partnerships or by corporations, except it partakes of the character of interstate commerce. The various instruments of commerce have brought the people so closely together, and the ramifications thereof have become so universal, that substantially all the business of the nation is interstate business, and the percentage of business done between citizens of the same state, namely, strictly intrastate business, is

relatively insignificant. This being so, powers of regulation involving the business of the country must, under the Constitution, necessarily be vested in Congress, and denied to the states.

The states cannot effectively provide for the enjoyment of the opportunities afforded by the instrumentalities of commerce. They have no right to legislate with reference thereto. If they undertook to do so, and Congress had acted or should act, the action of the states would instantly be nullified.

VII. Federal Incorporations.

The great development of the country in railroads and industrial enterprises and mercantile business generally, has made it impossible for any one person or collection of persons, from their own resources, to meet the financial requirements of such large undertakings. If the progress is to continue, the necessary capital must be found. This could not be secured from partnerships or individuals, but could only be effectively accomplished through the medium of corporations and the offer of their securities for public investment.

The utility, nay, the very necessity, of corporate form in business enterprises of this character can no longer be denied. Nor can it be denied that in their employment abuses have arisen which demand remedies at the hands of the law-making power. The existing tendency towards amalgamation has resulted in the formation of large corporations whose fields of operation are not limited by state or national lines, and which in every sense must be regarded, not as local, but as national enterprises. The states are powerless to deal effectively with these vast interests.

That being so, corporations must as nearly as possible be within the regulatory powers of Congress, both for their own protection and for the protection of the people. In order to give corporations their proper status in the nation, so as to enable them to continue to develop the commerce and resources of the country, as well as to secure the people and their property against corporate abuses, corporations engaged in interstate commerce should become *citizens of the United States*. As the law now is, great confusion exists. Corporations organized under the laws of one state are denied certain privileges under the laws of other states, and are

subject to obligations from which they are exempt in their own state. The investments of the people in such corporations are subject to vicissitudes and to the fluctuating legislation of the various states. To permit such conditions to continue means chaos, and an endless confusion of rights and obligations, without effective opportunity to vindicate such rights or redress the wrongs.

Is there not a remedy for these conditions? Is it possible that this great nation, possessing the broad powers vested by the Constitution, which together constitute an effective system of governmental regulation, should be unable to meet and cope with this situation? The answer is self-evident.

In the case of Paul *v.* Virginia, *supra*, the Supreme Court held that foreign corporations are not entitled to those privileges and immunities which are given to the citizens of the several states, but that the rights of foreign corporations, that is, corporations organized under the laws of one state undertaking to exercise their powers in a different state, can only be exercised as a matter of comity and not as a matter of right.

The recent decisions of the Supreme Court above set forth fully establish the law in respect to corporations engaged in interstate commerce and assure to them the full protection of all federal guarantees wherever their business is carried on, as also their freedom from state regulation seeking to curtail these rights.

In the case of Southern Railway Company *v.* Greene, *supra*, the Supreme Court has now fully established the doctrine that a corporation is a person within the meaning of the Fourteenth Amendment.

Corporations should also have the benefit of the constitutional guarantees contained in section 2 of Art. IV of the Constitution, namely:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States."

Of course this does not involve such privileges as the right of suffrage, but does embrace every property right in which any individual is protected.

Corporations have been held to be persons within the meaning of the Fourteenth Amendment, but not citizens of the United States. Corporations should be permitted to enjoy, so far as their property

or property rights are concerned, the same protection as citizens as is given to natural persons.

This, I am confident, can be accomplished by the organization of corporations engaged in interstate commerce under the direct authority of Congress. Under such a law, these corporations would be subject to all the conditions and regulations therein imposed. And, too, it cannot be successfully claimed that such legislation would be subject to any constitutional objection. A corporation engaged in interstate commerce is a means by which interstate or foreign commerce is conducted, and would be as much within the protection of the Commerce Clause as a railroad, which is a mere artery of commerce. No doubt is now entertained that railroads are mere instruments of interstate commerce, and subject to regulation as such; and other corporations engaging in interstate commerce would be held to be like agencies, and subject to like regulation. Corporations organized under federal authority would have many advantages in the management and conduct of their corporate affairs, which are not obtainable under state organization.

Mr. Attorney-General Wickersham, who, I understand, is sponsor for the Federal Incorporation Act introduced at the last session of Congress, said upon this subject in an article appearing in the Yale Law Journal:

> "Such corporations formed under national law would not be foreign corporations in any of the states, and would therefore be at liberty to transact their business without state permission and free from state interference. If, now, Congress shall enact a law providing for national incorporation to carry on interstate commerce, subject to such restrictions and with such freedom from local state control as Congress shall see fit to prescribe, state control of foreign corporations in all probability will soon cease to be a subject of great importance."

It is my judgment that we can safely go one step further than did the Attorney-General. I believe that a corporation organized under federal law may become a *citizen of the United States*, and as such will be *eo instanti* entitled to the protection and benefits and the immunities and privileges guaranteed by the Constitution to the citizens of each state, in so far as its rights and duties and obligations appertain to its property or property rights.

In this respect we have an expression of the Supreme Court in the case of Pensacola Telegraph Co. *v.* Western Union Telegraph Co.,[15] where the court, in speaking of the case of Paul *v.* Virginia, *supra*, directed attention to this thought in the following language:

"We are aware that in Paul *v.* Virginia, 8 Wall. 168 (75 U. S., XIX, 357), this court decided that a state might exclude a corporation of another state from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that 'The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.' (Art. IV, sec. 2.) That was not, however, the case of a corporation engaged in interstate commerce, and enough was said by the court to show that, if it had been, very different questions would have been presented."

In the case of Pullman Co. *v.* Kansas, *supra*, Mr. Justice White, in a separate concurring opinion, calls attention to an expression of the Supreme Court in Horn Silver Mining Company *v.* New York,[16] where it is announced that a limitation on the power of the state to interfere with the right of a foreign corporation to do business in another state does not apply where such corporation is in the employ of the general government. This exception, as Mr. Justice White says, was first stated by the late Mr. Justice Bradley in Stockton *v.* Baltimore & N. Y. R. Co.[17] In that case, the state of New Jersey, acting through its attorney-general, sought to prevent the Staten Island Rapid Transit Company, a New York corporation, and the Baltimore & N. Y. R. Co., a New Jersey corporation, from constructing or maintaining a railroad bridge across Staten Island Sound, on the ground that the assent of the state of New Jersey had not been secured, and that the state of New Jersey was the owner of the shore and land under water.

Incidentally, the question was raised as to the right of the Staten Island Rapid Transit Company to perform any acts or transact any business as a corporation in New Jersey, it not having qualified in that state as a foreign corporation. In that regard Mr. Justice Bradley says:

"The habits of business have so changed since the decision in the case of Bank of Augusta *v.* Earle, 13 Pet. 519, and corporate organizations

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[15] 96 U. S. 1. [16] 143 U. S. 305. [17] 32 Fed. 9, 14.

have been found so convenient, especially as avoiding a dissolution at every change of membership, that a large part of the business of the country has come to be transacted by their instrumentality; while their most objectionable feature, the non-liability of corporators, has in most instances been abrogated in whole or in part; and to deny their admission from one state to another in ordinary cases, at the the present day, would go far to neutralize that provision in the Fourth Article of the Constitution which secures to the citizens of one state all the privileges and immunities of citizens in another, and that provision of the Fourteenth Amendment which secures to all persons the equal protection of the laws. . . .

"It is undoubtedly just and proper that foreign corporations should be subject to the legitimate police regulations of the state, and should have, if required, an agent in the state to accept service of process when sued for acts done or contracts made therein. In reference to some branches of business, like those of banking and insurance, which affect the people at large, they may also be subject to more stringent regulations for the security of the public, and may be even prohibited from pursuing them except upon such terms and conditions, not unlawful in themselves, as the state chooses to impose. But in the pursuit of business authorized by the government of the United States, and under its protection, the corporations of other states cannot be prohibited or obstructed by any state. If Congress should employ a corporation of ship builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any state of the Union. And, in carrying on foreign and interstate commerce, corporations, equally with individuals, are within the protection of the commercial power of Congress, and cannot be molested in another state by state burdens or impediments."

Again, Mr. Justice Bradley, in the course of that decision, says:

"In our judgment, if Congress itself has the power to construct a bridge across a navigable stream for the furtherance of commerce among the states, it may authorize the same to be done by agents, whether individuals, or a corporation created by itself, or a state corporation already existing and concerned in the enterprise."

The Supreme Court in the Horn Silver Mining case, in commenting on Mr. Justice Bradley's decision, said:

"If Congress should employ a corporation of ship builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any state of the Union."

And the court, in citing this paragraph, added:

"without the permission and against the prohibition of the state. Mining Co. *v.* Pennsylvania, 125 U. S. 181, 186."

Corporations serving the government under authority of Congress are analogous to the case of a corporation doing interstate commerce business under direct authority of Congress, namely, by reason of incorporation under federal law. If a state corporation can, as is said by the Supreme Court, serve the government under authority of Congress in any state of the Union "without permission and against the prohibition of the state," any corporation organized under national law for the purpose of carrying on interstate commerce can be given and hence will have every protection and every privilege for that purpose accorded to any individual citizen of any state, and whatever business is done within the confines of a state by any such corporation organized under national law, will be regarded as an incident to its general business and its general power to conduct interstate commerce, and Congress will have and will exert its power to protect its own instrumentality of commerce from state interference.

And no state, because of the fact that a part of the business of such a corporation is conducted within the borders of that state, will be permitted to burden the interstate commerce of that corporation, and any effort in that direction will be regarded as in violation of the constitutional rights of such corporation. This is fully established beyond all question by the Western Union case decided at the last term by the Supreme Court.

Congress by authorizing the organization of a corporation to conduct interstate commerce is acting within the powers committed to it by the Constitution, and its enactments in that regard will be the "supreme Law of the Land," and corporations acting thereunder will receive the fullest protection of the constitutional guaranties.

But in the advocacy of corporations and corporate ownership, we must never lose sight of the other side, which demands such supervision over the organization and management of corporations as is requisite to protect the investor who makes the corporation possible; protect the people who are interested therein or affected thereby, as well as protect the public interest.

VIII. Publicity in Corporate Business.

One of the great forms of protection flowing from the organization of corporations under federal law, will be the power of Congress to provide, for the benefit of the public, the means of ascertaining the condition of every corporation at the time of its organization and of its management and operations. I am one of those who believe that the fullest corporate publicity is not only right, but should be enforced.

The late Mr. Justice Brewer said:

> "Publicity has a tendency to prevent schemes and keen transactions in corporate life. Publicity is not a new force in our national life, but its power is greater to-day than in the past. Publicity helps to form public opinion as the mighty force of the age."

Every corporation should be in duty bound to make reports to the stockholders at regular intervals. These reports should be given the fullest publicity, and should disclose with completeness all facts concerning its organization; its securities issued or to be issued, and the consideration therefor; its property, and its value; its earnings, and its operations generally. No corporation honestly organized and managed would object to making and publishing such reports. There can be no question that in the end full publicity of corporate organization and management will solve all questions of inflations in corporate securities and misrepresentations in the marketing thereof.

The investor should be enabled to determine for himself the advisability of investing in securities offered.

When corporations can be organized, as is the practice in this country, in a wholly perfunctory manner, without inquiry or investigation either as to the character or stability of the individuals interested, or as to the value of the securities to be issued, a duty, I think, rests upon the government to protect its citizens by requiring full reports to be made and published. The government cannot, of course, make itself the guardian of the investor's judgment, but it can discharge what seems a plain duty towards all citizens, by requiring all corporations to publish reports and statements of their affairs, so that investors may advise themselves with respect thereto; and, that done, I think it may fairly be said

the government has discharged its duty, and the responsibility thereafter will rest with the investor. If he is indifferent to the opportunities offered, or errs in the exercise of his judgment, the loss that he may suffer will be his misfortune.

It may be said that corporations seeking to avoid publicity will not avail themselves of any act of Congress providing for incorporation. That may be so for a time. Ultimately, as the advantages to corporations organized under national law become apparent, and when, too, crystallized public opinion will make it necessary for any reputable business corporation to make full publicity, the opportunity for incorporating under national law will be generally availed of.

Fortunately, Congress is not powerless to enforce corporate publicity, because, forsooth, those corporations seeking to avoid their reasonable obligation in that regard will not incorporate under national law. There are two well-recognized methods which can be availed of by Congress to secure compliance by corporations with the plain duty of publishing all the facts appertaining to its organization, its management, and its affairs.

Congress, by regulating the use of the mails and channels of interstate commerce, may compel every corporation engaged in any business, *whether interstate or not*, to give publicity to its corporate affairs, by legislation denying the use of the mails and the instruments of interstate commerce for the transmission of any matter concerning the affairs or business of any corporation that fails to make and file reports of the fullest nature concerning its organization and business, such, for example, as are already exacted from the interstate carriers under the Interstate Commerce Act. Such legislation would be valid and enforceable. The mails are an instrumentality organized and conducted by the national government for the benefit and convenience of the people. It is an agency over which the government has absolute and unqualified control, free from restraints or restrictions of any kind save those found in the Constitution. The government has the right to determine for itself what may be carried in the mails and what should be excluded therefrom.

The Supreme Court of the United States, through Chief Justice Fuller, in the case of *Ex parte* Rapier,[18] say in this respect:

[18] 143 U. S. 110.

"The states, before the Union was formed, could establish post-offices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post-roads was surrendered to the Congress, it was as a complete power; and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the states in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality."

Under the authority of this case, it appears Congress has absolute power over the mails and can regulate the use thereof as it chooses; that it has the right to say that no mail matter of any kind, whether emanating from the corporation or from any individual, should be carried unless the corporation concerned in such mail matter has made the required reports.

Just as effectively can Congress act through the regulation of the interstate commerce agencies, by prohibiting the use of express companies or carriers in transporting any matter relating to the business or affairs of a corporation failing to make such reports. This is an effective and practical method of enforcing publicity. Corporations could not interchange communications with their stockholders or transact any of their business through the mails or through the means of interstate commerce, unless they complied with such laws. Bankers could not offer for sale the securities of non-complying corporations, nor could such corporations' securities be transmitted either in the mails or through the agencies of interstate commerce, without violating such laws. Under these conditions every corporation engaged in business, whether interstate or not, would comply with the laws of Congress in that respect, and the desired and necessary publicity would be effected.

There is another power vested in Congress which for purposes of regulation is perhaps even more potent than that possessed by it through its control over interstate commerce and the mails. I refer to the power to lay and collect excise taxes. If the doctrine laid down in the case of McCray *v.* United States [19] is adhered to, the extent of that power for purposes of regulation is almost boundless.

[19] 195 U. S. 27.

In that case, the Supreme Court of the United States construed an act which levied a prohibitive tax upon colored butterine. The tax was ostensibly levied for the purpose of raising revenue, but its necessary effect was to render the manufacture and sale of colored butterine a commercial impossibility. The validity of the tax was attacked upon the ground that its evident purpose was not to raise revenue but to exercise a power not conferred by the Constitution in prohibiting the manufacture and sale of colored butterine.

The Supreme Court, in passing upon the validity of the act, held that it was not competent for the court to inquire into the purposes of Congress in passing the act; that Congress possessed power to classify subjects of taxation; that such classification could not be inquired into, and that even if such inquiry were permissible, the fact that colored butterine tended to deceive the public was a sufficient justification for levying upon it a higher rate of tax than that imposed upon uncolored butterine, which did not possess the same tendency to deceive.

By applying the practice pursued by Congress in McCray *v.* United States, *supra* (Oleomargarine case), we have another method of dealing with the matter of publicity.

The taxing power of the government is absolute and efficacious, and with reference to the kind of publicity here suggested, legislation could be enacted which would impose an excise tax upon the securities of any corporation which did not furnish to its stockholders and the public the requisite publicity.

As late as April 4, 1910, the Supreme Court of the United States, in the case of International Text-Book Company *v.* Pigg, reaffirmed the doctrine announced in the case of Crutcher *v.* Kentucky,[20] as follows:

"Congress would undoubtedly have the right to exact from associations of that kind [corporations engaged in interstate commerce] any guaranties it might deem necessary for the public security, and for the faithful transaction of business; and as it is within the province of Congress, it is to be presumed that Congress has done or will do all that is necessary and proper in that regard."

One of the recognized methods of regulation, therefore, is the exercise of the taxing power of Congress. Indeed this method of

[20] 141 U. S. 47.

regulation was exercised by Congress at the last session, in the enactments taxing corporations upon their income. The validity of this legislation is now before the Supreme Court in the so-called Corporation Tax Cases.

Mr. Justice Story, in his great work upon the Constitution, in speaking of the taxing power with reference to its use as a means of regulation, says, on page 687:

"Now, nothing is more clear, from the history of commercial nations, than the fact that the taxing power is often, very often, applied for other purposes than revenue. It is often applied as a regulation of commerce."

Legislation to limit or to exercise supervision over the issues of securities by corporations engaged in interstate commerce, particularly such as are not charged with a public interest, might, perhaps, become unnecessary or at any rate less important if full and complete publicity of the organization and affairs of such corporations would be provided for and enforced.

Conclusion.

The two vital differences between the Articles of Confederation and the Constitution have become clearer and more distinct as time has passed and the country has progressed. Each deals with the relative powers of the federal government and the states. These differences are the absence from the Articles of Confederation of any delegation of power by the states to Congress, to regulate commerce and the establishment by the Constitution of more perfect union among the people of the United States, instead of a league of friendship among the respective states.

The Constitution in its Preamble signalized the purpose thereof to be the establishment of a union of the people for all such purposes as affected or involved them as a nation.

It must be clear that as to all matters affecting the country and the people as a whole, there should be concentration of authority and uniformity of laws; there should be union of thought and union of action, for division of power and division of responsibility are subversive of strength and endurance. The general pursuits of the nation and its people require regulation within all its four corners;

for all pursuits, whether manufacture, mining, agriculture, commerce, transportation or finance, are so intertwined and interwoven as to require the people of each of the states to deal with the people of all the states. The power of regulation must not be divided, but should be united, in order to establish laws and regulations which make for the benefit of all the people, instead of regulations and laws made by the several states merely in the interests of their own citizens. The constitutional purpose "to form a more perfect Union" is best subserved when the law-making power which affects the interests and the well-being of all the people of all the states is centralized in a legislative body in which are represented the people from every section, whose different interests and varying thoughts may be brought to bear, in establishing and enacting such legislation as will best serve the common interest of a common country. That being so, the powers of regulation should rest with the national Congress, and that is where the wisdom of our forefathers placed them.

The federal government, acting through Congress, is the only power able to deal adequately with questions of universal interest to all the people. It is necessary to have one source of control, directly responsible to all the people of the nation, and to have simplicity, to avoid the complexities and embarrassments of conflicting State laws, no two of which are alike. A state hears only the interests of its own people in enacting its legislation. Congress is over all, of all, and for all the people. With laws in this form, amendments will be easy of accomplishment when needed, and wise policies given effect promptly, since application will be made to one law-making body instead of to many. With the powers of regulation vested in Congress, union of effort and concentration of authority, as well as uniformity of laws and uniformity of enforcement, are reasonably assured.

What is here contended for is not an enlargement upon the powers of Congress, but is merely in suggestion of remedies which can be availed of under the constitutional powers of Congress as they exist to-day, and which have not heretofore been fully exercised. At no time in our history have conditions so much required such action as now, and never were such laws more necessary in the interests of the well-being of the people and the future of the country.

States have repeatedly undertaken to exercise powers of regulation, each in its own selfish way, more or less intrenching upon the powers vested in Congress, and invariably have their enactments been condemned as unconstitutional. Such sporadic efforts, constantly failing, are subversive of good government and stimulate and require action by Congress through the powers conferred by the Constitution, fully established by that tribunal, whose edict is final and conclusive, and always wins the respect and compliance of the nation.

Max Pam.

CHICAGO, ILL.

SELDEN AS LEGAL HISTORIAN:

A COMMENT IN CRITICISM AND APPRECIATION.[1]

I

JOHN SELDEN, jurist, statesman, orientalist, historian, was born in 1584 and died in 1654. After studying at Oxford he became a member of the Inner Temple and was called to the Bar in 1612. He gave opinions and practised as a conveyancer; and occasionally, in great cases involving special learning, he appeared in court. In 1621 began his long and distinguished Parliamentary and public career in which his legal and constitutional knowledge, especially perhaps his familiarity with the original records of the realm, was of inestimable value. Even as a student in the Inns of Court he manifested, however, his special tastes and abilities for scholarly pursuits; and, active as he was in the practice of his profession and in the exciting political life of his age, antiquarian and oriental studies always occupied a very large share of his time and thought. The real starting-point in his career as a scholar seems to have been his early and inspiring friendship with Sir Robert Cotton, the antiquary; and it was not long before he came to share in the labours of the scholars who forgathered in Cotton's famous library. Here and elsewhere friendships and ties were formed with most of the leading lawyers, statesmen, orientalists, historians, and littérateurs of the time; and in an eminent group that included such men as Cotton, Camden, Spelman, Clarendon, Coke, Jonson, Ussher, Hale, and Hobbes, he soon acquired the proud distinction of being the most learned of them all.

Selden's literary activity began at an early age and lasted down to his death. In 1607 he contributed a prefatory *carmen protrepticon* to the *Volpone* of his friend Ben Jonson, the poet. In this same year he finished his *Analecton Anglo-Britannicon*, a work in which

[1] The present paper will also appear in a collection of essays to be published in Germany. In this form the paper will include nearly two hundred notes containing discussions of points raised by Selden, many quotations from his works, and full references to passages in these works in support of the positions maintained in the paper.

he endeavoured to summarise the history of the people inhabiting the island from the earliest times down to the coming of the Normans in 1066; but though finished in 1607 this work, dedicated to Cotton, was not published till 1615 at Frankfurt, and then in a corrupt and mutilated form. In 1610 appeared three works: *Jani Anglorum Facies altera*, *England's Epinomis*, and *The Duello or Single Combat.* In the first of these he discusses the laws and customs of the Britons, Saxons, and Norsemen. But, though marked by great learning, this work presents the sources in a partly indigested form; and it is also injured, as Fry has pointed out, by a failure to draw the line carefully between the successive inhabitants of the island. *England's Epinomis* is partly an English version of the *Jani Anglorum Facies altera;* but the former embodies a discussion of the laws of Richard I. and John not contained in the latter, and the latter also has passages not found in the former. In *The Duello* he traces the history of this mode of trial in various countries, and concludes that it was first introduced into England by the Normans.

In 1612, at the instance of Michael Drayton, the poet laureate, Selden wrote notes on the first eighteen cantos of Drayton's *Polyolbion;* and in the following year he composed commendatory verses in Greek, Latin, and English to the *Britannia's Pastorals* of William Browne. Selden's great work on *Titles of Honour* appeared in 1614. He first traces the history of the "supreme" titles of honour — those of emperors, kings, and other rulers — and his learned inquiries lead him back even to the time before the flood! In the second part of his work he takes up the inferior titles, such as those of heirs-apparent to thrones, dukes, and counts; and at the last his discussion includes feminine titles, honorary attributes like *clarissimus* and *illustris*, and the laws of precedence. In 1616 came Selden's edition of Sir John Fortescue's famous treatise *De Laudibus Legum Angliae*, and also his edition of the *Summae* of Hengham, an English medieval law writer. For Purchas he wrote in 1617 a *Treatise on the Jews in England.*

The first of Selden's works on oriental subjects, the *De Diis Syris*, was also published in 1617. So too in 1617 appeared *A Brief Discourse Touching the Office of Lord Chancellor of England*, dedicated to Sir Francis Bacon, and the *History of Tithes*, dedicated to Sir Robert Cotton. The latter is one of the greatest of all Selden's

works, and the one that has occasioned more controversy than any of the others. He traces the history of tithes among the Jews, Greeks, and Romans; then divides the history of tithes in the countries of the Christian era into four great periods of about four hundred years each; and finally devotes special chapters to the origin and development of tithes in England. Selden's contention that tithes were payable by the human positive law aroused those who believed that they were payable *jure divino;* and a fierce polemical discussion resulted. Selden's *Review of the History of Tithes, Admonition to the Reader of Sempil's Appendix, Reply to Tillesley's Animadversions upon the History of Tithes, Letter to the Marquess of Buckingham,* and *Of the Purpose and End in Writing the History of Tithes,* all resulted from this controversy and are among his most interesting productions. He was thrice summoned by King James to discuss with him the *History of Tithes* and other scholarly questions; and, at the king's orders, he wrote three tracts. Two of these were on the Revelation, — *Of the Passage in the Revelation of St. John Touching the Number 666,* and *Of Calvin's Judgment on the Revelation;* and the third was entitled *Of the Birthday of Our Saviour.*

In 1623 Selden published his edition of the six books of Eadmer, which present an account of the courts of William the Conqueror, William the Second, and Henry the First; and to the text itself Selden added his own "*Notae et Spicilegium.*" His elaborate account of the works of art collected by the Earl of Arundel appeared in his *Marmora Arundelliana* in 1629, and brought him reputation for his lapidary knowledge. Although written many years before, Selden's learned and famous treatise entitled *Mare Clausum* — in opposition to the contention of Grotius's *Mare Liberum* — did not appear till 1636. Graswinckel's attack on Selden and the *Mare Clausum* called forth Selden's *Vindiciae* in 1653. By command of the House of Lords he wrote his treatise on *The Privileges of the Baronage of England,* which was printed in 1642. His *Judicature in Parliament* was not published till 1681, after his death.

Selden's edition of Fleta — a medieval English law-book based largely upon Bracton — appeared in 1647. In his valuable prefatory *Dissertatio ad Fletam* Selden gives a learned account of the English medieval law writers and of the influence of Roman law on the English law. Sir Roger Twysden was assisted by Selden

in editing ten unpublished works on English history. This important work — known as *Decem Historiae Anglicanae Scriptores* — appeared in 1653, with a preface by Selden entitled *Judicium de Decem Historiae Anglicanae Scriptoribus.*

Selden's *De Diis Syris*, published in 1617 was followed by several other oriental studies of great value, most of them relating to ancient Jewish or rabbinical law. His *De Successionibus in Bona Defunctorum ad Leges Ebraeorum* appeared in 1631. In 1636 was published his *De Successione in Pontificatum Ebraeorum*, dedicated to Laud. The *De Jure Naturali et Gentium juxta Disciplinam Ebraeorum* came out in 1640. Four years later appeared *De Anno Civili et Calendario Veteris Ecclesiae seu Reipublicae Judaicae*, and in 1646 the *Uxor Ebraica seu de Nuptiis et Divortiis Veterum Ebraeorum.* The first part of the *De Synedriis Veterum Ebraeorum* was published in 1650, the second in 1653, and the unfinished third after Selden's death. These works on rabbinical law have won high praise from scholars for their great learning. But at the same time they have called forth complaints, by severe critics, of "their discursiveness and occasional obscurity, and still more of the uncritical use made by Selden of documents of very unequal value." "Indeed," writes Fry, "Selden's statements about Jewish law are more often based on comparatively modern compilations than on the original sources, to some of which perhaps he had not access; and in accepting the rabbinical tradition as a faithful account of the Israelitish state, he was behind the best criticism of his time."

Selden's edition of a fragment of the history of Eutychius — *Eutychii Ægyptii patriarchae orthodoxorum Alexandrini Ecclesiae suae origines* — appeared in 1642. His famous *Table Talk*, containing his conversational remarks on various topics, was first printed, after his death, in 1689.[2]

The variety of subjects covered by these writings is thus most striking, and clearly indicates the breadth of Selden's interest and knowledge; while nearly all his works give evidence of the powerful influence exerted upon his mind by the revival of learn-

[2] Further biographical and bibliographical details will be found in Fry's article on Selden in the *Dictionary of National Biography;* Aikin's *Life of John Selden;* Johnson's *Memoirs of John Selden;* the biographical preface to Singer's edition of the *Table Talk;* the preface and biography in vol. i, and the bibliographical preface in vol. iii, of Wilkins's edition of Selden's *Opera Omnia*, in three folio volumes (each volume in two parts), London, 1726.

ing. Many of his writings are concerned, in one way or another, with the history of law both in eastern and in western countries, rather particular attention being devoted perhaps to legal development in England; and, in addition to his own original investigations, his works include also several valuable editions of writers on English law and history. A perusal of some of these works has suggested to the present writer the following fragmentary observations upon Selden as a legal historian. Special regard is paid to Selden's conception of history and of the historian's office and to his own historical methods; and in this study attention is directed more to his English than to his Latin, and more to his western than to his eastern writings. It seems appropriate that on the three hundredth anniversary of the publication of Selden's earliest writings of importance — *The Duello* and two other works appeared in 1610 — some comment in criticism and in appreciation of his work on the history of law should thus be made.[3]

II.

Although our primary purpose is to examine Selden's methods in the writing of such of his works as are concerned with legal history, we cannot make this examination with the highest understanding and with the deepest appreciation unless we pause for a moment to place ourselves at his own point of view, — to see just how he looked upon history and just how he looked upon the historian's task.

To Selden "history is fact" and the task of the historian is simply and solely to discover that fact and to set it forth. This conception seems to have dominated him from the very start. In the preface to his early work *The Duello*, he affirms that "historical tradition of use and succinct description of ceremony are [his] ends"; and in the tract itself he remarks: "I search not, what indefinitely ought to be, but what was with us in England." His whole position is stated with even greater clearness in his *Purpose and End in Writing the History of Tithes*. He flatly denies the charge that he has expressed his own opinion on the question as

[3] In the preparation of the present paper the author has used Wilkins's edition of Selden's *Opera Omnia*, referred to in note 2, *supra*.

to the divine right of tithes, maintains that he has only reported what various fathers, divines, and canonists have held, and warmly concludes:

"And indeed, if I had done otherwise, I had run wholly from my title; for what had my opinion touching divine right been to matter of history, which is only fact, and was all that my title directed to? I never conceived that there was reason, why should it be exacted of him, who relates fact only, that he should conclude in a thing to which his premisses have no reference; that is, in matter of right. . . . And in sum, whatever I have there, from the beginning to the end, is but a collection into one volume of such things of fact, as lay before dispersed in many fathers, councils, stories, and other records, to be seen at any time, by them that desire them."

This, then, is Selden's attitude: History is what has actually been done and what has actually been thought by men in the past, and the historian's task in investigation and in composition is thus strictly limited by and to facts and phenomena. The historian may and must deal with the laws and institutions and practices of peoples and with the opinions held by men in reference to them, but he may and must deal with all these things merely as historical realities. His business is to search for and write down facts: it is no part of his business to express his own views in reference to those facts. This position comes out sharply in his *Admonition to the Reader of Sempil's Appendix.* "I have given you," he says, "the testimonies both ways; that only was my part." Again, further on, he remarks: "I was summarily to relate, not to discuss opinions; and for my own verdict, I have not yet learned that it is the part of him that writes an history, to give his verdict of what he relates." On the next page he spiritedly replies to Sempil: "He [Sempil] says, my judgment was suspected, touching the right of tithes. Alas! What is my judgment in such a point of divinity? Or why should it be suspected? Perhaps I was never sufficiently satisfied in that point, but doubted only as many do. When I have cause, I will tell what I think of it, but not in an history." In still another place he states: "Sir James [Sempil] never heard or read any opinion of mine touching this matter [*i. e.*, disposing of third tithe], unless he will call an historical narration upon other men's credits, an opinion."

Selden will restrict himself to the statement of facts and will not

in general allow his own personal view or interpretation of those facts any place in his historical work. He is possessed — and possessed fully — with a love for historical truth, and he sees that truth only in the actualities — only in the facts — of the past, quite untouched by the personality of the historian himself. It is only this objective historical truth, contained in fact and in fact alone, which it is the office of the historian to know himself and to make known to others. In the preface to the *History of Tithes*, where he is explaining his "course of composing" that work, he writes: "But all the bad titles that are ever due to abuse of the holiest obtestation, be always my companions, if I have purposely omitted any good authority of antient or late time, that I saw necessary, or could think might give further or other light to any position or part of it. For I sought only truth." Later on, after his work had been attacked by critics, he reiterates, in striking and vigorous passages, his high sense of duty to historical truth. In his remarks on Sempil's attack he says: "One meaning only I had, to tell that truth which I saw none had collected." To Tillesley he replies: "But there is not a passage in it [*History of Tithes*], but that I ever did think, and now do think, to be most constant truth, as I have there delivered it." There is a high note of sincerity in these words, and it is the same high note of sincerity that ennobles the passage from one of Hieronymus's epistles which Selden adopts as his own and which he places at the very beginning of his work on the *Uxor Ebraica*. "Haec nos," writes Hieronymus, "de intimo Hebraeorum fonte libavimus, non opinionum rivulos persequentes, neque errorum, quibus totus mundus repletus est, varietate perterriti, sed cupientes et scire et docere quae vera sunt."

"To know and to teach those things which are true" — this is the key-note to Selden's work; for his conception of history as the truth that underlies the facts of the past is most intimately connected with his idea of the purpose of historical studies. He is no mere antiquarian: he is an antiquarian and more than an antiquarian, for he is a real historian. He is not concerned with "bare and sterile antiquity"; he is concerned rather with the "fruitful and precious part," the "precious and useful part," of the past, for only this part of the past gives "light to the present," only this part of the past helps the present generation of men to understand their laws and customs and institutions and thus to resolve their

doubts and to solve their problems. This view is embodied in his preface to *Titles of Honour*, where he says: "In our Europe, as writers afforded occasion, I have been large: omitting, I think, no obsolete title, the knowledge whereof may help to the understanding of those in present use. The like I say of ensigns. But such as were meerly proper to their times, and have not so much as their shadow left, I have willingly forborn." The same position comes out in the preface to his edition of Fortescue's *De Laudibus Legum Angliae*. "To this edition," remarks Selden, "are added the *sums* of Sir Ralph de Hengham, chief justice to Edward I., never till now printed; in whom, although most of the learning be touching essoins, defaults, and course of proceedings in such actions which are in seldom use at this day, yet divers things occur both specially observable in what he hath touching those proceedings (which a professor of the law cannot but wish to know) as also he often otherwise gives light to the customs or law of his time, whence, as through an ancestor of the right line, we must deduct that of the present." He expresses himself more strongly in the preface to the *History of Tithes* in these words:

"Nor is any end in it to teach any innovation by an imperfect pattern had from the musty relicks of former time. Neither is antiquity related in it to shew barely what hath been, for the sterile part of antiquity which shews that only, and to no further purpose, I value even as slightly as dull ignorance doth the most precious and useful part of it, but to give other light to the practice and doubts of the present. Light, that is clear and necessary. Nor could such as have searched in the subject see at all often, for want of such light."

But Selden's lofty conception of history and its uses is nowhere stated with greater clarity and force than in his dedication of the *History of Tithes* to his friend and patron, Sir Robert Cotton. In the course of this graceful and dignified tribute to Cotton he expresses himself thus:

"For, as on the one side, it cannot be doubted but that the too studious affectation of bare and sterile antiquity, which is nothing else but to be exceeding busy about nothing, may soon descend to a dotage; so, on the other hand, the neglect or only vulgar regard of the fruitful and precious part of it, which gives necessary light to the present, in matter of state, law, history, and the understanding of good authors, is but preferring that kind of ignorant infancy, which our short life alone allows us, before

the many ages of former experience and observation, which may so accumulate years to us, as if we had lived even from the beginning of time."

It is clear from what we have already seen of Selden's own views of the purposes of historical study that he did not look upon himself as merely a narrative historian, but that he endeavoured to be at the same time a didactic historian. His purpose was not accomplished by the mere telling of his story; it was accomplished only if he taught, by presentation of the truth of historic facts, the lessons of the past ages to the people of his own day. It was because he would be a teacher that he sought to write only upon the "precious" and "fruitful" and "useful" part of the past, for that part and that alone would give "light" unto the present. The purpose of instruction clearly underlies most, if not all, of his writings; and some of them indeed, such as the *Privileges of the Baronage of England*, were composed with the avowed practical object of conveying instruction to particular persons for particular purposes. No one, it is believed, can read Selden's works carefully and thoughtfully without feeling convinced that as a didactic historian he has been fully — and even eminently — successful.

But a further — and more difficult — question arises. May we place Selden among those historians who trace, in one or more of its phases, the evolution of human society? Is he a development-historian? In endeavouring to give some answer to this question we must of course not forget that Selden flourished over two hundred years before the application of the Darwinian theory of evolution to historical studies, and that it would be impossible therefore to expect from him any conscious work along the lines of that precise doctrine. But for many hundreds of years before the existence of the new historical school of the nineteenth century various historians have, at one time and another, given evidence of some conception of history as a development; and it is believed that Selden may properly be counted as one of them. His knowledge of the world's history, of the laws and customs and institutions of many peoples in many ages, gave him just that broad and comparative outlook on the facts of the past which it is necessary for any historian to have before he can properly and truly conceive of social development. Certainly we are justified in saying that he seeks for the origins of laws and customs and institutions, that

he notes the causes of historical changes, that he looks to the environment of historical phenomena, that he carefully observes historical periods, and that he conceives of the legal system of the present day as growing out of the legal system of the ages of the past. All of this may not amount to a conscious and fully developed theory of social and legal development, but at any rate it is a real and a far-seeing approach to such a theory.

Selden carefully distinguishes history from other branches of knowledge. Thus he draws a sharp line between mythology and history; and, though he loves philology and exalts it, he does not identify it with history, as some scholars have done and still do. He seems rather to view philology as an independent science which has aims of its own, but which nevertheless renders assistance — and necessary assistance — to legal history and to various other branches of knowledge. It is something to chronicle that a scholar of the classical tastes and abilities of Selden refuses, in the early seventeenth century, to adopt the view of many classical philologists that philology is history and history, philology. He takes rather the position, now being more and more adopted by scholars, that the two sciences, helpful though they may be and must be to each other, are yet distinct and different sciences, with distinct and different purposes and methods.

In a single word we may characterise Selden's whole attitude toward history and the historian as the attitude of the scientist, and not that of the philosopher. Selden's historical vision was far-reaching, but it was the far-reaching vision of the scientific historian, not the far-reaching vision of the philosophical historian; and this vision it was which, as we shall see directly, determined the character of his own work and the methods he employed to accomplish it.

III.

Indeed, Selden's conception of history and of the task of the historian affected his whole attitude toward the materials out of which he built up his historical works. It was his high ideal of the historical truth that exists in facts and facts alone that consciously and purposely guided him in the collection and employment of his sources of information as to what those facts were and as to when and where those facts existed. It was this high ideal that led him,

in exercising his "liberty of inquiry" by the "most accurate way of search," to seek diligently for authorities and to seek, too, only "good authorities," "authorities of best choice," "most choice and authentick monuments," "monuments of infallible credit," "known and certain monuments of truth"; for it was only these authentic and reliable sources, "chosen by weight, not by number," that gave him the "best light" as to the past. Indeed it was this high ideal that led him, wherever it was possible, to seek and to use as the solid basis of his historical work the original sources — the "original monuments"— themselves. In more than one place in his writings he has himself told us of his love for the "fountains" of knowledge and his firm conviction that in them historical truth is to be discovered in the surest way. As early as 1610 he writes in the preface to *The Duello*: "My aims shall take him for an advocate, which long since affirmed the full pleasing Syrens to be but allegories of antique records." Later on, in the preface to the *Titles of Honour*, he says: "Wherever my inquisition might aid, I vent to you nothing quoted at second hand, but ever loved the fountain, and, when I could come at it, used that medium only, which would not at all, or least, deceive by refraction." Again, when he is discussing his authorities in the preface to the *History of Tithes*, he remarks: "The fountains only, and what best cleared them, satisfied me; and I supposed every judicious reader would be so best satisfied also." At the very beginning of his work on the *Uxor Ebraica* he adopts for himself that sentence from one of the epistles of Hieronymus which we have already quoted: "Haec nos de intimo Hebraeorum fonte libavimus, non opinionum rivulos persequentes, neque errorum, quibus totus mundus repletus est, varietate perterriti, sed cupientes et scire et docere quae vera sunt."

Selden has, then, the very highest regard for the fountains themselves; and it is because of this very highest regard that he attacks — and attacks bitterly and even savagely — those writers who merely copy the one from the other, without independent research for themselves, and who thus pass on error from one to the other and from age to age. In the preface to the *History of Tithes*, for instance, we find him relentless in his criticism of certain sorts of ecclesiastical writers who are copyists and nothing more; and, in another connection, even the great Ivo of Chartres does not escape his scathing strictures.

In this insistence upon the value of the fountains Selden was not a prophet — he was an apostle. In earnestly and resolutely drawing the minds of his readers "back to the sources!", he but voiced the spirit of his own day and the spirit of the days before his own. All parts of learned Europe had heard and were still hearing, had obeyed and were still obeying, this call of the humanists; and the group of historians and other scholars that formed itself about Cotton in Cotton's priceless library were but partakers in the common tasks and in the common aspirations of the age. It may well be that not all of these men were quite aware that they were merely sharing in a broader movement; but we feel confident that Selden himself, the most learned Englishman of his time, was fully conscious that he was a helper in an intellectual awakening that was not bounded by the lands and the waters of England. Even if we had not evidence of this on nearly every page of his writings, his erudition was too deep and his vision too broad to permit us to assume for a single moment that he was unaware of being a co-worker in the sources with the legal historians and the scholars of France and of Germany and of other countries.

In examining the actual materials underlying Selden's historical works, we find that several different kinds of materials have been employed. Of these a word.

In the first place it is important to observe that he has based his writings on both primary and secondary sources of information. He was reluctant to rely on secondary sources; but he tells us that, when he did so rely, he frankly confessed it. He much preferred primary sources; for he was content only with the best authorities, and the best authorities for him consisted in the primary sources themselves. His reliance on them is observable in his very earliest writings — such as *England's Epinomis*, *The Duello*, and *Of the Jews sometime living in England* — and this remained to the last as perhaps the most characteristic feature of all his work. If, for instance, he was writing upon English legal history, what he in part based his work upon were of course the classical English law writers, such as Glanvill, Bracton, Fleta, Britton, Littleton, and Fitzherbert; but he seems to have relied much more often and much more confidently upon such primary sources as Domesday Book, charters, plea rolls, year books, the register of original writs, and statutes; for it was only when he had consulted these, that

he felt he was getting down to the bed-rock of legal historical truth.

In his letter to Vincent he strongly emphasised the necessity for the use of manuscript materials in the study and writing of English history, for in his day a comparatively small part of the great store-house of English sources had found their way into print. To use his own simile, the study and writing of English history by the use of printed materials alone was like plastering and painting a weak and poor building which needed much more the strengthening and enlarging that could be effected only by the employment of timber and stone. He followed his own precepts; for in his works on English history — including the history of English law — he made large use of the timber and stone of manuscript materials. But in general, not only in his works on English history, but also in those relating to other branches of historical inquiry, he refused to rely entirely on printed sources and carefully studied the manuscripts in his own library and the various libraries, such as that of Cotton, to which he had access. This was only proceeding in accordance with his fixed principle to see and to use only the best available authority; and it was an example that might well be followed with profit by more of our present-day historians.

In the writing of legal history he did not restrict himself to legal sources alone, but made full use of non-legal sources as well. The most striking illustration of this is seen in the quotations from poetical writings — in various languages — that embellish so many of his pages. He brings in verses, he tells us, because he believes they are "of necessary use in the search of" historical truth; and few legal writers have so enlivened and elucidated prosaical topics by poetical sources as he.

It was in accordance with his high standard of scholarship that he used the sources in their original language, and not in translation. He suspected translations of not always conveying the sense of the original; but he recognised that even learned readers — for whom he was writing — might not in all cases command the language of certain of the sources which he quoted, and he maintained accordingly that in such cases the use of translations — or at least explanations — was desirable and even necessary for the elucidation of the original texts themselves. In quoting, for instance, sources of English law he exacted of his readers a knowledge of

Latin and French, but he recognised that few, even of the learned, knew the old Anglo-Saxon, and he supplied them therefore with a translation of sources written in that tongue.

It was also characteristic of Selden that he consulted, if possible, not only late editions of the primary sources, but also, where they were necessary or would shed light, recently published secondary sources. This illustrates to us afresh his desire to get the "best light" on historical problems and his scientific bent of mind.

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[*To be continued.*]

THE MEANING OF FIRE IN AN INSURANCE POLICY AGAINST LOSS OR DAMAGE BY FIRE.

SUPPOSE that A procures insurance against loss or damage to his house by fire, that he kindles a fire in the house for a useful purpose and without intent to do injury, and that such fire does damage to the house. Suppose further that the fire is kindled by him in a place intended and provided therefor, and does the damage complained of by heat or smoke without causing flame or ignition outside the limits of such place. Suppose, on the other hand, that the fire kindled in the place provided for it starts a fire outside the limits of such place, and that this second fire does the damage. Can A recover under the policy in either event, and if so, when?

It is elementary that a policy of insurance is a contract by the insurer to indemnify the insured against loss by the casualty defined in the policy. The insured pays a sum certain for protection against an event which may or may not occur during the life of the policy. The premium is calculated with respect to the average chance that the given event will ever occur. This is especially the case with fire and marine insurance. It is true that in life insurance the insured is certain to die sometime. Death is an ancient custom for which civilization has as yet found no remedy. But even a life policy is essentially a contingent contract. The contingency is that the insured will die before reaching the average age of risks of his class. The premium is expected to cover the chance that this event will occur. Whether the policy be fire, marine, or life, contingency is the very essence of the contract.

An insurance policy, like other contracts, must be construed with reference to the circumstances under which it was made. The contingent nature of the contract is a controlling and vital circumstance. Indeed it qualifies the very language of the instrument. This language must be construed in the light of the fact

that the premium is calculated upon the average probability of loss. If the insured intentionally causes the loss insured against, he strikes at the essence of the agreement. He intentionally substitutes a certainty for the contingency against which the parties contracted, and on which the premium was based. Even though the policy contains no express provision on the point, the nature of the contract precludes recovery under such circumstances.[1] If the insured intentionally burns the property he thereby avoids his fire policy.[2] If he commits suicide while sane his estate cannot recover upon his life policy.[3] If he intentionally destroys his ship the insurer has a defense to his marine policy.[4] Indeed, sufficiently grave misconduct on the part of the insured,[5] or of an agent for whom he is responsible,[6] is a bar, even though there be no intention to cause loss. Thus where the insured, while racing his steamer against another steamer, broached a barrel of spirits of turpentine close to the mouth of the furnace, in order to use the turpentine for fuel, and thereby set the steamer on fire, he was held to have forfeited his right to recover, although he neither intended nor desired to destroy the vessel.[7] And where the charterer of a vessel, with knowledge of the facts, tried to cross a very hazardous bar,

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[1] Vance, Insurance, 476, note 40; May, Insurance, § 407.

[2] Schmidt *v.* New York, etc. Ins. Co., 1 Gray (Mass.) 529; Kane *v.* Hibernia Ins. Co., 39 N. J. L. 697. But if the insured burn the property while insane his act is no defense to the insurer. Karow *v.* Continental Ins. Co., 57 Wis. 56.

[3] Ritter *v.* Mutual Life Ins. Co., 169 U. S. 139; Supreme Commandery *v.* Ainsworth, 71 Ala. 436. The weight of authority, however, permits recovery by a *beneficiary*, even though the insured commit suicide while sane. Patterson *v.* Natural Premium, etc. Ins. Co., 100 Wis. 118, and cases cited; 21 HARV. L. REV. 530. This seems to rest on the theory, held in a number of states, that the beneficiary has a vested interest in the proceeds of the policy, and therefore ought not to be prejudiced by the improper act of the insured who, as to him, is deemed a third party for whom he is not responsible. *Cf.* notes 9–12, *post.*

[4] Waters *v.* Merchants', etc. Ins. Co., 11 Pet. (U. S.) 213.

[5] Chandler *v.* Worcester, etc. Ins. Co., 3 Cush. (Mass.) 328; Ostrander, Fire Insurance, 480; May, Insurance, §§ 407, 411. And see Gove *v.* Insurance Co., 48 N. H. 41.

[6] Williams *v.* New England, etc. Ins. Co., 3 Cliff. (U. S.) 244. See also Waters *v.* Merchants', etc. Ins. Co., 11 Pet. (U. S.) 213, where the barratry of the master and crew was held a defense to the insurer.

[7] Citizens' Ins. Co. *v.* Marsh, 41 Pa. St. 386. But see Johnson *v.* Berkshire, etc. Ins. Co., 4 Allen (Mass.) 388, where it was held that one who tried to burn out a bees' nest under the barn door, and thereby destroyed the barn, though without any fraudulent intent, was negligent, but was not guilty of such misconduct as would avoid the policy.

without excuse, and thereby lost the ship, the insured was denied recovery, though neither he nor the charterer intended the loss, on the ground that the insured was legally responsible for the charterer's misconduct.[8] On the other hand, intentional burning of the property by a third party,[9] by the wife [10] or husband [11] of the insured, or even by the agent of the insured while acting beyond the scope of his authority,[12] will not bar recovery by the insured under a fire policy if the insured was not privy to the burning. In the same way destruction of the property by the municipal authorities in order to check the spread of fire is no defense to the insurer.[13] In other words, the peril intended and contemplated by the parties is a peril which is *accidental with respect to the insured.* Indemnity against casualty is the essence of insurance. The nature of the contract itself qualifies the words "death," "fire," or "peril of the sea," by adding the words "accidental with respect to the insured," precisely as if the latter phrase had been expressed.

Yet the fact that the loss is occasioned by the insured will not necessarily bar his recovery. Insurance policies are strictly construed against the insurer because he is usually the author of language used therein. The nature of the policy compelled the courts to hold that where the loss was caused intentionally or by the sufficiently serious misconduct of the insured, there could be no recovery, even though the policy made no express provision for such a case. Such a loss is not a casualty with respect to the insured. But the policy includes any accidental loss which falls within the risks specified. Intentional destruction by a third party without privity of the insured is an accident with respect to the policy-

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[8] Williams *v.* New England, etc. Ins. Co., 3 Cliff. (U. S.) 244.

[9] Westchester F. Ins. Co. *v.* Foster, 90 Ill. 121; Catlin *v.* Springfield, etc. Ins. Co., 1 Sumner (U. S.) 434. See also Hartford F. Ins. Co. *v.* Williams, 63 Fed. 925.

[10] Walker *v.* Phœnix Ins. Co., 62 Mo. App. 209; Midland Ins. Co. *v.* Smith, L. R. 6 Q. B. D. 561, 568 (*semble*). See also Mickey *v.* Burlington Ins. Co., 35 Ia. 174 (negligent act of wife); Gove *v.* Insurance Co., 48 N. H. 41 (property burned by insane wife).

[11] Perry *v.* Mechanics', etc. Ins. Co., 11 Fed. 485; Plinsky *v.* Germania Ins. Co., 32 Fed. 47.

[12] Feibelman *v.* Manchester, etc. Assur. Co., 108 Ala. 180; Henderson *v.* Western, etc. Ins. Co., 10 Rob. (La.) 164.

[13] City Fire Ins. Co. *v.* Corlies, 21 Wend. (N. Y.) 367; Greenwald *v.* Insurance Co., 3 Phila. (Pa.) 323.

holder. A loss innocently caused by the policy-holder is recoverable. In the same way the negligence of the insured or of his agents is deemed a casualty with respect to him. It is true that negligence increases the hazard, but the contingency has not been intentionally turned into a certainty by the insured. There is, therefore, a wide difference in degree between negligence on the one hand, and intentional destruction or misconduct on the other. Moreover, negligence is one of the normal human risks. If the negligence of the insured or his servant were a defense to the insurer, a great part of the value of the policy would vanish. These reasons have led the courts in insurance cases to look on negligence as an innocent accident, rather than as a breach of legal duty. As recovery for loss caused by the insured's negligence can scarcely be said to fly in the face of the policy, it has been generally held that the insurer must expressly except such negligence in order to rely on it as a bar. In the absence of such a stipulation negligence on the part of the insured or his agents is no defense to the insurer.[14] With respect to the policy-holder it is a casualty.

It is, of course, fundamental that where the casualty defined in the policy is fire, the loss for which recovery may be had must be proximately caused by fire within the usual meaning of that word. Scientifically we know that what we call fire is simply a chemical reaction by which oxygen unites with some substance to form a chemical compound. Yet not every such reaction is fire. The rusting of iron, the rotting of wood, the tarnishing of the base metals, are all examples of this reaction. But they are not fire. Fire implies flame or ignition. Thus damage caused by the rending effect of lightning,[15] without actual ignition, is not damage by fire. It has also been held that where property was charred by escaping steam, but without flame or glow, there was no loss within

[14] Vance, Insurance, 476; Ostrander, Insurance, 478; May, Insurance, § 408; Columbia Ins. Co. *v.* Lawrence, 10 Pet. (U. S.) 507; Waters *v.* Insurance Co., 11 Pet. (U. S.) 213; Catlin *v.* Springfield, etc. Ins. Co., 1 Sumner (U. S.) 434; Johnson *v.* Berkshire, etc. Ins. Co., 4 Allen (Mass.) 388; Mickey *v.* Burlington Ins. Co., 35 Ia. 174; Phenix Ins. Co. *v.* Sullivan, 39 Kan. 449; Wertheimer Co. *v.* U. S., etc. Ins. Co., 172 Mo. 135. In Karow *v.* Continental Ins. Co., 57 Wis. 56, the insured, who burned his property while insane, was allowed to recover.

[15] Kenniston *v.* Merrimack Ins. Co., 14 N. H. 341; Babcock *v.* Montgomery, etc. Ins. Co., 6 Barb. (N. Y.) 637; Babcock *v.* Montgomery, etc. Ins. Co., 4 N. Y. 326; Vance, Insurance, 482; Ostrander, Insurance, § 189; May, Insurance, § 406; Wood, Insurance, § 238.

the meaning of the policy.[16] In the same way heat[17] or smoke[18] are not themselves fire, though damage by heat or smoke may be recovered if it be the proximate result of fire within the meaning of the policy.[19] Even injury by "spontaneous combustion" is not a loss by fire unless the combustion be sufficient to produce visible flame or glow. Thus in Western, etc. Co. *v.* Northern Assurance Co.[20] certain wool became wet and was destroyed by spontaneous combustion. The heat was so great that the wool could not be handled with bare hands, but at no time was there visible glow or flame. The court held that such combustion was not fire within the meaning of the policy. Flame, glow, or ignition, then, is an essential element of the fire casualty.

Yet there may be recovery under a fire policy even though the property injured was not even scorched, much less ignited. Generally speaking a fire policy covers not only damage done by the flames, but all damage which is the proximate consequence of fire within the meaning of the policy.[21] Thus in Lynn Gas, etc. Co. *v.* Meriden Fire Ins. Co.[22] a fire in the wire tower of the plaintiff caused a short circuit of the electric current, and this short circuit threw a sudden strain on a fly-wheel in another building and caused the fly-wheel to burst and do much damage. The property so injured was not even warmed by the fire, which was quickly put out. *Held*, that the whole damage is the proximate consequence of fire and so recoverable. In Ermentrout *v.* Girard, etc. Co.[23] a fire in the building of X caused the wall of that building to fall and injure the building of the plaintiff. *Held*, that this was a loss by fire. In the same way damage caused by water used to extinguish

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[16] Gibbons *v.* German, etc. Inst., 30 Ill. App. 263.

[17] Austin *v.* Drewe, 4 Camp. 360; American Towing Co. *v.* German, etc. Co., 74 Md. 25; Gibbons *v.* German, etc. Inst., 30 Ill. App. 263.

[18] Cannon *v.* Phœnix Ins. Co., 110 Ga. 563; Fitzgerald *v.* German American Ins. Co., 62 N. Y. Supp. 824, 30 N. Y. Misc. 72; Samuels *v.* Continental Ins. Co., 2 Pa. Dist. Ct. 397; Austin *v.* Drewe, 4 Camp. 360.

[19] Way *v.* Abington Ins. Co., 166 Mass. 67; Collins *v.* Delaware Ins. Co., 9 Pa. Super. Ct. 576.

[20] 139 Fed. 637. In 199 U. S. 608 a writ of *certiorari* was denied. *Cf.* Singleton *v.* Phenix Ins. Co., 138 N. Y. 298; Sun Ins. Office *v.* Western, etc. Co., 72 Kan. 41.

[21] Vance, Insurance, 476; Joyce, Insurance, § 2779; Wood, Insurance, §§ 105, 106.

[22] 158 Mass. 570.

[23] 63 Minn. 305.

fire,[24] by removal to avoid fire,[25] by theft during a fire,[26] or even by destruction by the municipal authorities to prevent the spread of fire,[27] are all reckoned as damage by fire. Curiously enough, however, recovery has been denied for damage done by the concussion of a distant explosion of powder,[28] even though an explosion of powder [29] or inflammable vapor [30] is itself fire within the meaning of the policy. Such a loss seems quite as proximate a result of fire as the bursting of the fly-wheel in the Lynn case, *supra*. Certainly these explosion cases are not sufficient to shake the general rule that if the injury to the goods is due to fire as a proximate cause, the loss is recoverable under a fire policy, even though the goods themselves were never ignited. It must be noted, however, that in all these cases, the Lynn case and the explosion cases alike, a fire accidental with respect to the insured was one link in the chain of causation which led up to the injury. The question at issue was whether this link was sufficiently connected with the injury to be the proximate cause of it. It is manifest that such cases do not touch the question as to what is fire within the meaning of an insurance policy.

Fire, then, as used in an insurance policy, implies accidental combustion accompanied by visible flame or glow. Each ingredient is essential. Flame or glow, as an element of combustion, is essential because flame or glow is the earmark of the phenomenon known in common speech as fire. But the word "fire" is also modified by the circumstances under which it is used in the policy. The contingent nature of the contract is a controlling circumstance in its construction. This circumstance cuts down the general word "fire" to "fire which is accidental with respect to the insured."

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[24] Wood, Insurance, § 105; 19 Cyc. 828, note 46.

[25] Balestracci *v.* Firemen's Ins. Co., 34 La. Ann. 844; Independent Ins. Co. *v.* Agnew, 34 Pa. St. 96. But see Hillier *v.* Alleghany, etc. Ins. Co., 3 Barr (Pa.) 470.

[26] Wood, Insurance, § 106; Joyce, Insurance, § 2821; 19 Cyc. 828, notes 47, 48.

[27] See *ante*, note 13.

[28] Everett *v.* London, etc. Co., 19 C. B. N. S. 126; Caballero *v.* Home, etc. Ins. Co., 15 La. Ann. 217.

[29] Scripture *v.* Lowell, etc. Ins. Co., 10 Cush. (Mass.) 356; Hobbs *v.* Northern Assur. Co., 12 Can. Sup. 631.

[30] Renshaw *v.* Fireman's Ins. Co., 33 Mo. App. 394; Renshaw *v.* Missouri, etc. Ins. Co., 103 Mo. 599. On the other hand, damage by the explosion of a steam boiler is not a loss by fire, since burning or combustion is not the central principle of such an explosion. Millaudon *v.* New Orleans Ins. Co., 4 La. Ann. 15.

The nature of the contract renders this accidental ingredient essential. Unless, therefore, the accidental quality and the glow or flame quality coexist in the proximate cause of the injury, there can be no recovery under a fire policy.

In the light of these principles, the questions at the beginning of this article take on a new aspect. The flame or glow element is undoubtedly present. It is conceded that such flame or glow is the proximate cause of damage to the insured. But is the damage caused by a fire which is accidental with respect to the insured? On this point we must examine the authorities.

The leading case is Austin *v.* Drew,[31] in which the facts were as follows: The premises insured were a sugar manufactory of seven or eight stories. On the ground floor were pans for boiling sugar and a stove to heat them. From the stove a chimney went to the top of the building; and in the chimney was a register which had to be opened when there was fire in the stove. One morning a servant forgot to open the register and in consequence smoke, sparks, and heat were forced into the room where the sugars were drying. One or two men were suffocated in attempting to open the register, but it was finally opened. Had it remained shut much longer the premises would have been burnt down; but in point of fact there never was more fire than was necessary to carry on the manufacture, and the flame never got beyond the flue. The sugars, however, were much damaged by the smoke and still more by the heat. The loss amounted to several thousand pounds. On these facts Chief Justice Gibbs thus instructed the jury:

"I am of opinion that this action is not maintainable. There was no more fire than always exists when the manufacture is going on. Nothing was consumed by fire. The plaintiffs' loss arose from negligent management of their machinery. The sugars were chiefly damaged by heat; and what produced that heat? Not any fire against which the company insures, but the fire for heating the pans, which continued all the time to burn without any excess. . . . If there is a fire it is no answer that it was occasioned by the negligence or misconduct of servants; but in this case there was no fire except in the stove and the flue, as there ought to have been, and the loss was occasioned by the confinement of heat. Had the fire been brought out of the flue, and anything had been burnt, the company would have been liable. But

[31] 4 Camp. 360; Holt N. P. 126; affirmed, 6 Taunt. 436, 2 Marshall, 130.

can this be said where the fire was never at all excessive, and was always confined within its proper limits? This is not a fire within the meaning of the policy nor a loss for which the company undertakes. They might as well be sued for the damage done to drawing-room furniture by a smoky chimney."

In Cannon *v.* Phœnix Insurance Co.[32] the action was brought on a policy against "all direct loss or damage by fire." The proof of loss alleged that a certain stove-pipe in the plaintiff's building became disconnected, and that when a fire was built in the stove beneath, smoke and soot escaped into the second story of the building and did the damage complained of, which amounted to some three thousand dollars. The proof of loss also alleged that the stove-pipe and ceiling became very hot and that part of the damage was caused by water poured on to cool the ceiling. The defendant objected to the admission in evidence of the proof of loss, because the proof nowhere alleged that there was any fire except in the stove where it was intended to be. The trial judge excluded the evidence and there was a nonsuit. In affirming the ruling of the trial judge, Lewis, J., adopts and quotes the following principle, laid down in 1 Wood, Fire Insurance, § 103:

"Where fire is employed as an agent, either for the ordinary purposes of heating the building, for the purposes of manufacture, or as an instrument of art, the insurer is not liable for the consequences thereof, *so long as the fire itself is confined within the limits of the agencies employed*, as, from the effects of smoke or heat evolved thereby, or escaping therefrom, from any cause, whether intentional or accidental. In order to bring such consequences within the risk there must be actual ignition outside of the agencies employed, not *purposely* caused by the assured, and these, as a consequence of such ignition, *dehors* the agencies."

In American Towing Co. *v.* German Fire Insurance Co.[33] a steam-tug, her boiler and machinery, were insured against "all loss or

[32] 110 Ga. 562. *Cf.* Mickey *v.* Burlington Ins. Co., 35 Ia. 174, where a fire kindled under similar circumstances set fire to the building, and the plaintiff recovered.

[33] 74 Md. 25. Compare with this Hazard *v.* New England, etc. Ins. Co., 7 Pet. (U. S.) 557; s. c. below, 1 Sumner (U. S.) 218; Martin *v.* Salem, etc. Ins. Co., 2 Mass. 420; and Rohl *v.* Parr, 1 Esp. 445, in which it was held that injury done by worms was not a "peril of the sea" within the meaning of a marine policy, but simply wear and tear for which there could be no recovery. And in Magnus *v.* Buttemer, 11 C. B. 876, recovery was denied where a vessel was intentionally allowed to take ground while unloading, though the policy covered "standing," because such an injury was mere wear and tear.

damage to the same by fire." A fire occurred on board and did some damage to the hull. The boiler was also injured, but there was conflict in the evidence as to whether the damage to the boiler was caused by the exterior fire or by the fire in the furnaces beneath the boiler. The insurance company conceded its liability for the damage by the fire outside the boiler, and settled therefor. The trial judge instructed the jury in substance that if the damage to the boiler was caused by the fire in the furnaces, and not by fire outside the furnaces, the plaintiff could not recover under the policy. The plaintiff excepted to this instruction. In holding that the instruction was correct, Chief Justice Alvey said:

"The subject of the policy is a steam-tug, her boiler, and other machinery. Of necessity, fire was to be maintained in the furnace, and in contact with the boiler, as a means to generate the motive power by which the vessel could be propelled. . . . The fire while in the furnace was in its proper place and where it was intended to be, and it was placed there to act upon the boiler, which in course of time would be burnt out or warped, as the grate of the furnace would be, by the continued action of fire thereon. And if such results of the action of fire upon these materials while in ordinary use are not within the risk, it would be difficult to say upon what degree of heat or under what conditions the liability under the policy would attach for injury caused by the action of the fire while confined to the furnace and producing no external ignition. If a person has his house insured against all loss or damage by fire, and he should make a fire in his grate or fireplace of such intense heat as to crack his chimney or warp or crack his mantelpieces, it could hardly be contended that he could hold the insurance company liable for such damage, though the damage was unintentionally allowed to be produced by the action of the fire. In such case the fire would not have extended beyond the proper limits within which it was intended to burn; but the heat emitted therefrom would have produced effects not intended by the insured."

In Gibbons *v.* German Insurance and Savings Institution[34] the plaintiff sought to recover, under an ordinary fire insurance policy, for injury and charring caused by steam which escaped from the apparatus by which the rooms were heated. In affirming a judgment for the defendant, Gary, J., after citing Austin *v.* Drew, said:

[34] 30 Ill. App. 263.

"The damage there, was the consequence of negligently omitting to open a proper outlet for the escape of the heat; here, by the accidental opening of an improper one. In each case there was excessive heat, but no fire where it ought not to have been. Fire and heat are not one, but cause and effect; and damage by heat is not insured against in terms and is covered by the policy only when the misplaced fire causes it. If the fire were a moral agent no blame could be imputed to it. It was doing its duty and no more. The damage was caused by another agent who, undertaking to transmit the beneficial influence of the fire, broke down in the task."

In Fitzgerald *v.* German-American Ins. Co.[35] the plaintiff brought action upon a policy against "loss or damage by fire," to recover for injury done by a smoking lamp. There was no fire outside of the lamp itself. In reversing a judgment for the plaintiff, Dunmore, J., said:

"The rule seems to be that where the insured employs fire for economic or scientific purposes, and the fire is confined to the agencies so employed, and damage ensues, without any actual ignition to the property insured, the insurance company is not liable."

In Samuels *v.* Continental Ins. Co.[36] recovery was denied (though without opinion) for smoke damage caused by a flaring lamp, though the flame rose two or three feet above the chimney, but ignited nothing outside the lamp.

In Collins *v.* Delaware Ins. Co.[37] the plaintiff brought action on a fire policy for damage done by a fire in an oil stove. The evidence was conflicting as to whether the fire in the oil stove was confined to the wick, or spread to the oil reservoir. The trial judge in substance charged the jury that if the damage was due to smoke or heat caused by a fire in its proper place in the stove there could be no recovery, but that if the damage was caused by a fire out of its proper place they should find for the plaintiff. The jury found for the plaintiff and the defendant alleged exceptions. In overruling these exceptions Rice, P. J., quoted from Way *v.* Abington, etc. Ins. Co.,[38] and said:

"If a stove should be cracked and spoiled by a fire kindled in it to warm the house, or if a fire in a fireplace should crack the mantel, or

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[35] 62 N. Y. Supp. 824; 30 N. Y. Misc. 72.
[36] 2 Pa. Dist. Ct. 397.
[37] 9 Pa. Super. Ct. 576.

scorch valuable furniture left too near it, or injure property by its smoke, which the chimney failed to carry off, or if a lamp should throw off soot or smoke in such quantities as to cause damage to property, in every such case, it may be conceded, if the fire burned nothing but that which was intended to be burned for a useful purpose in connection with the occupation of the house, and if it did not pass beyond the limits assigned to it, the insurance company would not be liable. . . . Again, as was said in Way *v.* Abington Mut. Fire Ins. Co.,[38] a distinction should be made between a fire intentionally lighted and maintained for a useful purpose in connection with the occupation of a building, and a fire which starts from such a fire without human agency in a place where fires are never lighted nor maintained." . . .

In Millaudon *v.* New Orleans Ins. Co.[39] the court affirmed a judgment which denied recovery under an ordinary fire policy for damage caused by an exploding steam boiler, where there was no fire except under the boiler.

In O'Connor *v.* Queen Insurance Co.[40] the plaintiff brought action on a standard policy which insured "against all direct loss or damage by fire." The evidence, as to which there was little if any dispute, was that the plaintiff's servant built a fire in the furnace with paper and cannel coal, not used or intended to be used for such purpose, which fire within a few minutes developed to such a degree of fury as to fill the house with great volumes of smoke, soot, and excessive and intense heat, whereby the property was damaged to the extent of some five hundred dollars. The trial judge ruled for the plaintiff. This ruling was affirmed by a divided court, Marshall, J., dissenting. At p. 394 Kerwin, J., thus distinguishes Austin *v.* Drew:

"The foregoing cases,[41] we think, fully show that Austin *v.* Drew, 4 Camp. 360, is not authority against plaintiff here. There the fire was under control, not excessive, and suitable and proper for the purpose intended. It was, in the language of the books, a 'friendly' and not a 'hostile' fire. In the case before us the fire was extraordinary and unusual, unsuitable for the purpose intended and in a measure uncontrollable, beside being inherently dangerous because of the unsuitable material

[38] 166 Mass. 67. [39] 4 La. Ann. 15. [40] 140 Wis. 388.

[41] These cases were cases like Lynn Gas Co. *v.* Meriden, etc. Ins. Co., *supra*, where a fire out of its proper place was the proximate cause of the damage, though the property injured was not itself ignited. For a fuller statement of the distinction between those cases and the O'Connor case, see the dissenting opinion of Marshall, J.

used. Such a fire was, we think, a 'hostile' fire and within the contemplation of the policy."

In Way *v.* Abington Mut. Fire Ins. Co.[42] the plaintiff brought action on a Massachusetts standard fire policy to recover for

[42] 166 Mass. 67; Collins *v.* Delaware Ins. Co., 9 Pa. Super. Ct. 576; Mickey *v* Burlington Ins. Co., 35 (Ia.) 174, *acc.*

In Massachusetts two unreported cases in the Superior Court, which were not carried up to the Supreme Court, supplement and are in accord with the *dictum* in Way *v.* Abington, etc. Ins. Co., *supra*. See also *dictum* in Scripture *v.* Lowell, etc. Ins. Co., 10 Cush. (Mass.) 356, 360.

In Breen *v.* Ætna Ins. Co., Suffolk, 1895, No. 6102, the plaintiff declared in the usual manner on a fire policy, and the defendant answered the general denial. The bill of exceptions showed in substance that the defendant insured certain premises of the plaintiff against fire; that said premises were warmed by an ordinary stove; that before leaving the premises on a certain winter's night the plaintiff kindled a fire in said stove and set thereon a peanut roaster full of peanuts to warm over night; that by reason of the arrangement of the dampers of the stove the fire became unusually hot; that the unusual heat developed by the fire was sufficient to crack a wooden post near the stove; that the heat developed by said unusual fire caused the peanuts to give off a thick brown oily smoke which injured the goods and premises of the plaintiff to the extent of two or three hundred dollars; and that the peanuts themselves were eventually charred and consumed. At the close of the evidence the trial judge (Mason, C. J.) ruled that the plaintiff could not recover and directed a verdict for the defendant.

In Clark *v.* Fireman's Fund Ins. Co., Worcester, 1910, No. 8143, the plaintiff declared on a policy insuring his Stanley steam automobile against "loss or damage by fire arising from any cause whatsoever." The answer was a general denial. The case was tried without jury before Sanderson, J., who found as follows:

"The court finds that the plaintiff owned an automobile run by steam and insured by the defendant; that on September 17, 1909, he was operating this automobile on the highway when the water in the boiler became exhausted. The plaintiff filled the tank of the automobile with water and, supposing that it ran in the usual way into the boiler, started the automobile and ran it for some distance when he discovered that no water had gone into the boiler. When this was discovered the boiler was white with heat, the ends of the tubes had become fused and were emitting sparks, and flame was coming out causing damage to the paint, the mud guard, and the sill. The sparks emitted from the ends of the tubes indicated a burning in the sense that there was then an actual uniting of the metal with the oxygen of the air. The amount of damage to the boiler was $214.75, caused entirely by the action of the usual flame in the automobile confined in the place where it was intended to be, upon an empty boiler. The absence of water in the boiler was the proximate cause of the damage to the boiler. The court rules that the plaintiff cannot recover for this damage to the boiler.

"The damage to the paint, the sill, and the mud guard resulted from fire outside of the place where the fire was intended to be, for which the plaintiff is entitled to recover.

"The amount of this damage is thirty-five dollars, with interest from the date of the writ."

damage done by smoke thrown off by a fire in the plaintiff's chimney, which fire was caused by a fire lighted in the stove below. There was no fire except in the stove and in the chimney. The trial judge ruled that the plaintiff could recover. In overruling the defendant's exceptions, Knowlton, J., after stating at some length the argument that there could be no recovery because there was no fire except where fire was intended to be, said:

"We are not disposed to question the soundness of the general principle on which this contention is founded, and we find it by no means easy to determine whether the principle should be extended far enough to cover an occasional fire in a chimney incidental to the ordinary use of a stove, or whether such a fire should be held to be one for whose unexpected and injurious consequences an insurance company should be liable. We are inclined to the opinion that a distinction should be made between a fire intentionally lighted and maintained for a useful purpose in connection with the occupation of a building and a fire which starts without human agency in a place where fires are never lighted nor maintained, although such ignition may naturally be expected to occur occasionally as an incident to the maintenance of necessary fires, and although the place where it occurs is constructed with a view to prevent damage from such ignition. A fire in a chimney should be considered rather a hostile fire than a friendly fire, and as such, if it causes damage, it is within the provisions of ordinary contracts of fire insurance."

In Brown *v.* Kings County Fire Ins. Co.[43] it was held that the insured could recover where he placed a certain rather inflammable ointment on the stove to heat and the ointment ignited and caused the fire complained of.

Another group of cases also bears on the question. Fire policies frequently except explosion of any kind from the peril insured against. Thus the standard fire policy excepts all loss by explosion unless fire ensues, and then imposes liability only for the loss by fire. Explosion, however, may be due to the ignition and rapid combustion of explosive vapor. Sometimes the igniting cause is a gas flame, lighted match, or lighted lamp. Counsel have frequently urged that the gas flame, lamp, or the like is itself fire, that such fire is the proximate cause of the explosion, and that the damage done by the explosion is the proximate result of this precedent fire and so recoverable as a loss by fire irrespective of the explosion ex-

[43] 31 How. Pr. (N. Y.) 508.

ception. This contention has almost invariably failed. It has frequently been held in such a case, that a lighted match,[44] a lighted lamp,[45] a lighted gas jet,[46] or even a furnace fire [47] is not a fire within the meaning of the policy. On the other hand, if an accidental and destructive fire precede the explosion, and the explosion is caused by such fire, the explosion is simply an incident of such destructive fire and the whole loss may be recovered as a fire loss.[48] If, then, the fire policy except damage by explosion, and an explosion occur, the question whether the explosion damage may be recovered as a loss by fire turns on the nature of the fire which preceded and caused the explosion. If the precedent fire be intentionally kindled by the insured for a useful purpose in a place provided therefor, it is not fire for which there can be recovery even though it cause the explosion. If, however, the precedent fire be an accidental fire with respect to the insured, then the damage by explosion is treated as a fire loss, in spite of the explosion exception in the policy. It is evident, therefore, that these explosion cases illustrate very neatly the distinction between accidental and non-accidental fires.

Another question which was suggested by the original case of Austin *v.* Drew still remains to be considered. In that case the court pointed out that the fire was confined to the place intended for it and that it was not excessive. Which factor controls the decision? The direct decisions on this point are singularly few. The explosion cases just discussed do not raise the point on the facts. In each the gas flame, lamp flame, or match flame which caused the explosion seems to have been of the usual size, though this factor seems not to have been noted or relied on. The fire seems not to have been excessive in Cannon *v.* Phœnix Insurance Co., American Towing Co. *v.* German Fire Insurance Co., and Gibbons *v.* German Insurance and Savings Institution, but in none of these

[44] Heuer *v.* Northwestern, etc. Ins. Co., 144 Ill. 393; Mitchell *v.* Potomac Ins. Co., 183 U. S. 42; Vorse *v.* Jersey Plate Glass Ins. Co., 119 Ia. 555.

[45] German-American Ins. Co. *v.* Hyman, 42 Colo. 156; Briggs *v.* North American, etc. Ins. Co., 53 N. Y. 446.

[46] Home Lodge Assur. *v.* Queen Ins. Co., 21 S. Dak. 165; United Life, etc. Ins. Co. *v.* Foote, 22 Oh. St. 340.

[47] St. John *v.* American, etc. Ins. Co., 11 N. Y. 516.

[48] Washburn *v.* Farmers' Ins. Co., 2 Fed. 304; Washburn *v.* Miami, etc. Ins. Co., 2 Fed. 633; Washburn *v.* Artisans' Ins. Co., Fed. Cas. No. 17,212; Washburn *v.* Western Ins. Co., Fed. Cas. No. 17,216; Stephens *v.* Fire Assoc., 139 Mo. App. 369; Vance, Insurance, 480, and see *ante*, notes 44–47.

cases is the non-liability of the insurer placed on that ground. In each case the court relies entirely on the fact that there was no fire except where fire was intended to be. In Samuels *v.* Continental Ins. Co. the flame streamed two or three feet above the lamp chimney, and the court, without opinion, denied recovery. In Fitzgerald *v.* German-American Ins. Co., the other smoking lamp case, it may be inferred that the flame was unusually high, but the court nowhere mentions it.

In Way *v.* Abington Mut. Fire Ins. Co., Collins *v.* Delaware Ins. Co., and Brown *v.* Kings County Ins. Co. the original intentional fire caused a second accidental fire. In the Way case and the Collins case the liability of the plaintiff is placed expressly on the existence of fire where fire was not intended to be, while in the Brown case the point seems to be assumed. In O'Connor *v.* Queen Ins. Co., however, the court permitted recovery because of the excessive and unusual nature of the fire, even though the fire was apparently confined within the place where fire was intended to be; but this position is vigorously assailed in the dissenting opinion of Marshall, J. In this respect the reasoning of practically all the other cases, the text-writers,[49] and *dicta* in Way *v.* Abington Mut. Fire Ins. Co. and American Towing Co. *v.* German Fire Ins. Co., seem to support Justice Marshall. The actual decisions in Samuels *v.* Continental Ins. Co. and in Fitzgerald *v.* German-American Ins. Co. also look the same way. Until O'Connor *v.* Queen Ins. Co. the locus and origin of the fire were treated by courts and text-writers alike as the ground of decision.

The view which makes the locus and origin of the fire the test of its accidental or non-accidental quality with respect to the insured seems more in accord with principle and with authority. The occurrence of fire damage without more cannot be the test. One who intentionally burns the property on which he procured insurance does not recover because the property is ruined. Even though live steam escape from a radiator and do injury, the nature of the furnace fire remains unchanged. The fire in the stove cannot acquire an accidental origin because it scorches a valuable chair. The fire in the fireplace does not become a casualty with respect

[49] Vance, Insurance, 477; Ostrander, Fire Insurance, § 188; Wood, Insurance, § 103; May, Insurance, § 402; Joyce, Insurance, § 2779, 2796; Richards, Insurance Law, 3 ed., 284; Clement, Fire Insurance, 86 and 87.

to the insured because smoke escapes from the chimney and soils his pictures. The consequences which flow from a fire intentionally kindled by the insured can no more reach back and change the nature of that fire than a conclusion can alter the premiss on which it is based.

The size of the fire affords no satisfactory test of its character with respect to the insured. The fact that the lamp was intentionally lighted by the insured still remains, even though the lamp flame stream two feet above the chimney and cast off smoke. Even though the fire in the furnace burn with great fury and fill the house with unintended smoke and heat, there is no fire except that which was intentionally kindled by the servant. Of course, a fire intentionally lighted in a place provided for it may start another fire accidentally outside such place. But such a case must be sharply distinguished from the case where the intentional fire gives out an unusual or unintended amount of heat or smoke. In the former case there are two fires, one intentional and one accidental; in the latter case merely accidental consequences of a fire intentionally kindled by the insured. It is manifest that such consequences cannot reach back and alter the character of the fire which caused them. That character was fixed before the unusual heat or smoke was developed. It follows that it is not material whether the fire which caused the injury was excessive or not excessive. The locus and origin of the fire, not its size, is the logical and proper test of its accidental character.

One other point remains to be considered. Suppose that the injury is caused in part by the accidental fire outside the place intended, and partly by the intentional fire within such place, what is the measure of damages? On this point the writer has found no direct reported decision.[50] But on principle the question seems covered by the cases already discussed. A non-accidental fire is not fire within the meaning of the policy. Even though such fire cause damage it is not recoverable. The result should be the same where the damage is caused in part by an accidental and in part a non-accidental fire. It seems to follow, therefore, that only damage due to the fire outside the place intended should be recovered.[51]

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[50] But see Clark *v.* Fireman's Fund Ins. Co., reported by the author, *supra*, note 42.

[51] See Beakes *v.* Phœnix, etc. Co., 143 N. Y. 402; Warmcastle *v.* Scottish, etc. Ins.

In summary, then, we have the following propositions:

1. Fire, within the meaning of an ordinary insurance policy, means combustion which is accidental with respect to the insured, accompanied by visible flame or glow.

2. If the insured, or one for whom he is legally responsible, kindles a fire with intent to injure the premises insured, such fire is not fire within the meaning of the policy for want of the accidental quality.

3. If the insured, or one for whom he is legally responsible, kindles a fire for some useful purpose and without intent to do injury, in a place intended and provided for said fire, such fire while confined within such place is not fire within the meaning of the policy, and any damage done thereby by smoke or heat is not recoverable.

4. The reasoning of the cases and of the text-writers indicates that the same rule would be applied even though such fire so kindled in the place intended therefor were excessive or of unusual size, but the rule in Wisconsin is the other way.

5. If the fire intentionally kindled in a place provided therefor, accidentally causes combustion accompanied by flame or glow outside the limits of the place where the original intentional fire was kindled, the second, or accidental, fire is fire within the meaning of the policy, and any damage done by such accidental fire is recoverable.

6. It seems to follow that where damage is caused in part by an intentional fire and in part by an accidental fire, only such damage as was caused by the accidental fire may be recovered.

In a word, fire, as used in an ordinary fire policy, means fire which is accidental with respect to the insured. Moreover, the accidental quality must attach to the fire itself. An intentional fire plus accidental damage do not constitute accidental fire. In such a case the accidental quality attaches to the loss alone and is no part of the flame which caused the loss. But it is the cause of the loss, not the occurrence of loss, which determines whether

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Co., 201 Pa. St. 302; German Am. Ins. Co. *v.* Hyman, 42 Colo. 156. In each of these cases the evidence tended to show that part of the damage was due to a cause included in the policy and that part was due to a cause excepted from the policy. The court in each instance held that the burden was on the plaintiff to show how much of the damage was due to the cause included in the policy and that failure to confine the plaintiff to that measure of damage was reversible error.

there may be recovery. A fire kindled by the insured in a place provided therefor is an intentional fire. It cannot acquire the necessary accidental quality because smoke or heat evolved thereby does damage. The lack of this essential accidental quality *in the fire itself* is fatal to recovery.

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THE LAW SCHOOL. — The registration in the School on November 15 for the last twelve years is shown in the following table: —

	1899–1900	1900–01	1901–02	1902–03	1903–04	1904–05
Res. Grad. . .	—	1	1	—	4	1
Third year . .	134	144	149	167	180	182
Second year . .	193	202	190	196	201	232
First year . . .	232	241	229	228	293	285
Specials . . .	51	58	59	49	60	58
	610	646	628	640	738	758

	1905–06	1906–07	1907–08	1908–09	1909–10	1910–11
Res. Grad. . .	1	—	2	—	—	—
Fourth year . .	—	—	—	—	—	2
Third year . .	192	190	171	169	187	178
Second year . .	216	199	198	207	191	238
First year . . .	243	243	280	244	311	296
Unclassified . .	—	—	—	—	—	82
Specials . . .	64	62	63	64	70	3
	716	694	714	684	759	799

The following tables show the sources from which the twelve successive classes have been drawn, both as to previous college training and as to geographical districts: —

	HARVARD GRADUATES.			
Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1902	59	2	28	89
1903	43	4	28	75
1904	47	5	17	69
1905	44	4	20	68
1906	52	7	32	91
1907	44	6	40	90
1908	39	5	27	71
1909	30	6	29	65
1910	46	9	38	93
1911	35	5	18	58
1912	36	10	28	74
1913	42	7	33	82

GRADUATES OF OTHER COLLEGES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1902	22	29	61	112
1903	23	26	83	132
1904	25	29	74	128
1905	23	27	78	128
1906	30	45	92	167
1907	32	33	89	154
1908	19	33	96	148
1909	30	24	98	152
1910	25	27	101	153
1911	26	29	104	159
1912	38	33	150	221
1913	18	27	151	196

HOLDING NO DEGREE.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.	Total of Class.
1902	18	4	9	31	232
1903	21	1	12	34	241
1904	22	—	10	32	229
1905	12	2	18	32	228
1906	25	1	9	35	293
1907	18	5	18	41	285
1908	14	1	9	24	243
1909	11	3	12	26	243
1910	15	1	18	34	280
1911	12	1	14	27	244
1912	7	2	7	16	311
1913	5	—	13	18	296

As the eighteen Harvard seniors in the first year class have in each instance completed the work required for the A.B. degree, all members of the class are virtually college graduates. The same is true of practically the entire School. Of the eighty-two unclassified students, thirty-seven have entered this year, and of these twenty-nine are graduates of a college or university, and eight are graduates of law schools.

One hundred and thirty-eight colleges and universities have representatives now in the School as compared with one hundred and twenty-four last year and one hundred and twenty the previous year. In the first-year class eighty-three colleges and universities, as compared with eighty last year, are represented as follows: Harvard, 101; Princeton, 23; Yale, 22; Brown, Dartmouth, 12; Bowdoin, University of Iowa, 7; Amherst, Kansas University, 5; Missouri, Williams, 4; California, DePauw, Holy Cross, Illinois, Marietta, 3; Arkansas, Cincinnati, Cornell University, Knox, Maine, Miami, Michigan, Minnesota, Oberlin, Oregon, Oxford, Virginia, Wabash, Wisconsin, 2; Baker, Bates, Beloit, Bucknell, Carleton, Catholic University, Central University, Chicago, Clark College, Coe, Colgate, Colorado, Columbia, Cornell College, Denison, Fairmount, George Washington, Greenville, Hamilton, Indiana, Iowa College, Kenyon, Kingfisher, Lafayette, Lake Forest, Macalester, Mt. St. Mary's, University of Nebraska, Nebraska Wesleyan, New Brunswick, Notre Dame, Ohio State, Ohio Northern, Pennsylvania, Randolph-Macon, Richmond, Rochester, University of the South, South Dakota, Southern California, Texas, Toronto, Tufts, Tulane, U. S. Naval Academy, Utah Agricultural College, Valparaiso, Washington State College, Washington University, Washington and Jefferson, Wesleyan (Conn.), Wittenberg, Wooster, 1.

THE CASE OF SPRECKELS SUGAR REFINING CO. *v.* MCCLAIN. — In an article by Mr. Francis W. Bird in the last number of this Review, the case of *Spreckels Sugar Refining Co.* v. *McClain*, in which the excise tax on the business of refining sugar was sustained, was stated with reference to its bearing on the Corporation Tax Cases.[1] At the request of subscribers, the Review publishes the following statement concerning the decision of the Spreckels case.

An examination of the decisions with reference to the question of income from wharves and investments shows that the Circuit Court held both income from wharves and income from investments taxable.[2] In the Circuit Court of Appeals, Dallas and Acheson, J. J., confirmed this ruling. Gray, J., agreed as to the income from wharves but dissented as to the income from investments.[3] In the Supreme Court this dissent was confirmed and the decision of the Circuit Court of Appeals was reversed, the final decision being that as the wharves were part of the business plant the receipts from wharves were receipts from the business and so taxable; but that income from investments and bank deposits not part of the business of sugar refining, was not within the statute taxing that business. These questions were treated as questions of statutory construction.[4]

ELIGIBILITY OF WOMEN FOR PUBLIC OFFICE. — Is a woman eligible for public office? In many states this question is answered by express provisions in the constitution, some restricting the privilege to males [1] and a few forbidding sex to be a ground for discrimination as to certain offices.[2] And unless the constitution is interpreted as imposing a restriction,[3] the legislature has power to make women eligible.[4] But the cases which are not cared for by such provisions are in hopeless conflict. Up to very recent times, woman's desire to hold office seems to have been slight. A few interesting instances of female officials can be found in the history of mediæval England,[5] but the disputes which came into court usually involved only some such point as the right to a hereditary office; [6] and so the question of the eligibility of women to elective positions was not thoroughly considered. That women are not eligible for judicial offices is law more from absence of any precedent than from actual decisions; [7] and practically nowhere has a woman's right to

[1] 24 HARV. L. REV. 37.
[2] 109 Fed. 76, 79.
[3] 113 Fed. 244, 247.
[4] 192 U. S. 397, 413–417.

[1] See Oh. Const. (1851) Art. V, sec. 1, Art. XV, sec. 4; Ore. Const. Art. II, sec. 2; Art. VI, sec. 8.
[2] See Minn. Const. Art. 7, sec. 8.
[3] See State *v.* Adams, 58 Oh. St. 612; Opinion of the Justices, 165 Mass. 599.
[4] Application of Miss Goodell, 48 Wis. 693; Opinions of the Justices, 62 Me. 596.
[5] For a collection of these, see Robinson's Case, 131 Mass. 376, and 38 L. R. A. 208, note.
[6] See, for instance, *Ex parte* Burrell, 2 Bro. P. C. 146.
[7] See State *v.* Davidson, 92 Tenn. 531; Robinson's Case, *supra; In re* Bradwell, 55 Ill. 535. It has been decided that a woman cannot be a justice of the peace, Opinion of the Justices, 107 Mass. 604; or a prosecuting attorney, Atty.-Gen. *v.* Abbott, 121 Mich. 540; but she may be an arbitrator, Evans *v.* Ives, 15 Phila. 635; or a commissioner to take evidence, The Norway, Fed. Cas. No. 10,358. Statutes now almost

membership in a legislative body been upheld.[8] The question of administrative positions, however, has been more frequently litigated, and is more complex.

A distinction should be made between true public offices and positions of a merely ministerial nature: women are eligible for the latter,[9] and hold thousands in this country. The law seems, moreover, more liberal towards women's being in appointive than in elective offices,[10] and in offices exercisable through a deputy than in those demanding personal attention.[11] While the courts have sometimes said that delicacy or a woman's natural unfitness for executive duties is the reason for barring her,[12] these arguments never appear to have been considered with much seriousness. It has also been argued that the change in the social and economic position of woman should change her political status.[13] But the question is not one of public policy, and the decisions do not seem to have been influenced by the judges' personal opinions on the desirability of administration by women.[14] The sole issue should be whether the sovereign has given women any such political power.[15] In spite of occasional tenure of obscure offices by women in England, the practically uninterrupted usage to the contrary, acquiesced in for centuries, would seem to settle the common law.[16] And although the exclusive use of masculine pronouns in the constitutions in this country has never been regarded as excluding women,[17] there has been little tendency to construe general provisions in their favor. A few judges have thought that where some clauses make sex a qualification, but the eligibility clause does not, the omission is sufficient to open offices to women;[18] but clearer language than this should be required to make so radical a change from the common law, and so several courts have held.[19] Most constitutions restrict suffrage to males,[20] and even where eligibility for office is not expressly confined to electors, it would seem naturally to be predicated on the right to exercise this primary governmental function.[21]

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everywhere allow women to practice law. In the absence of statute, they were generally excluded. Matter of Goodell, 39 Wis. 232; *In re* Bradwell, *supra*. *Contra*, Ricker's Petition, 66 N. H. 207.

[8] See De Souza *v.* Cobden, [1891] 1 Q. B. 687; Beresford-Hope *v.* Lady Sandhurst, 23 Q. B. D. 79.

[9] Anon., 3 Salk. 2 (governess of workhouse); Opinion of the Justices, 136 Mass. 578 (member of health board); Warwick *v.* State, 25 Ohio St. 21 (deputy clerk of court).

[10] *Cf.* Anon., 2 Ld. Raym. 1014, with De Souza *v.* Cobden, *supra;* Harbour-Pitt Shoe Co. *v.* Dixon, 60 S. W. 186 (Ky.), with Atchison *v.* Lucas, 83 Ky. 451.

[11] See Chorlton *v.* Lings, L. R. 4 C. P. 374; Opinion of the Justices, 150 Mass. 586.

[12] See Matter of Goodell, *supra*.

[13] See Atty.-Gen. *v.* Abbott, *supra; In re* Hall, 50 Conn. 131.

[14] See Opinion of the Justices, 73 N. H. 621, 622; State *v.* Stevens, 29 Ore. 464, 474.

[15] See COOLEY, CONSTITUTIONAL LIMITATIONS, 894, note 1.

[16] See Chorlton *v.* Lings, *supra; In re* Bradwell, *supra*. But see *In re* Hall, *supra*. No decision prior to 1870 against woman's eligibility has been found.

[17] See Russell *v.* Guptill, 13 Wash. 360; Atchison *v.* Lucas, *supra*.

[18] Wright *v.* Noell, 16 Kan. 601; Opinions of the Justices, 62 Me. 596. And where, in a revision of a statute, the word "male" was omitted, the change was deemed important. State *v.* Hostetter, 137 Mo. 636.

[19] Beresford-Hope *v.* Lady Sandhurst, *supra;* Atchison *v.* Lucas, *supra*.

[20] See N. Y. Const. Art. II, sec. 1. Mass. Const., Amendments, Art. III.

[21] See State *v.* Van Beek, 87 Ia. 569; State *v.* McMillen, 23 Neb. 385; State *v.* Smith, 14 Wis. 497.

On this ground, several cases have denied women the right to hold office.[22]

It is consequently noteworthy that the Supreme Court of Nebraska, a state which does not give women the ballot,[23] has recently decided that a woman elected to the office of county treasurer may get from the rival male candidate the property pertaining to the office. *State ex rel. Jordan* v. *Quible*, 86 Neb. 417.[24] This is well-nigh the most important elective position which a woman has been sanctioned in holding, and, as a dissenting judge observes,[25] the decision makes it possible for a woman to be even governor.

THE REFERENDUM AS A "REPUBLICAN FORM OF GOVERNMENT." — The referendum has frequently been attacked as a delegation of legislative power and hence contrary to the state constitutions, which vest that power in the legislature.[1] Notwithstanding this argument, a general statute to take effect only if approved by a majority of the voters was upheld in a recent Wisconsin case. *State ex rel. Van Alstine* v. *Frear*, 142 Wis. 320.[2]

In view of the comparative ease with which state constitutions are amended, the relation to them of direct legislation is not of such great practical importance as its validity under the Constitution of the United States. An objection to the referendum, especially when coupled with the initiative, which has frequently been suggested,[3] but is not discussed in the principal case, is that direct legislation violates the clause of the federal Constitution which guarantees to each state a republican form of government.[4] The contention is that a republic is a representative democracy as distinguished from a direct or pure democracy. Hence it becomes important to determine the true meaning of the word.

The Latin *res publica*, at least as late as the sixteenth century, was altogether colorless as to the form of government it designated.[5] The compound adjective is not found in classical or mediæval Latin.[6] The noun "republic" and the adjective "republican" were used by Wilson,[7]

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[22] See Atty.-Gen. *v.* Abbott, *supra;* Atchison *v.* Lucas, *supra*. But see State *v.* Hostetter, *supra;* Wright *v.* Noell, *supra*. It has been said that conferring suffrage on women makes them eligible for office. See State *v.* Cones, 15 Neb. 444. *Cf.* Olive *v.* Ingram, 2 Strange 1114. But in England it has been held that a woman is not eligible even for an office for which she can vote. Beresford-Hope *v.* Lady Sandhurst, *supra*.

[23] But see State *v.* Cones, *supra*.

[24] The decision went on the ground that this is the common law. The constitution formerly restricted office-holding to voters. Neb. Const. (1866) Art. III, sec. 4. And members of the legislature are expressly required to be electors. Neb. Const. (1875) Art. III, sec. 5. But the court did not comment on these points.

[25] See 86 Neb. 417, 420.

[1] For a discussion of this phase of the problem, see 7 HARV. L. REV. 485; 16 *ibid.* 218.

[2] For a discussion of another point in the same case see 24 HARV. L. REV. 50.

[3] See MCCLAIN, CONSTITUTIONAL LAW, 10; 56 CENT. L. J. 247. But see Southwestern Telegraph & Telephone Co. *v.* City of Dallas, 131 S. W. 80 (Tex.).

[4] U. S. CONST. art. 4, § 4.

[5] See CALVIN, INSTITUTIONUM CHRISTIANAE RELIGIONIS, lib. 4, cap. 20.

[6] It does not appear in DU CANGE, GLOSSARIUM.

[7] See Chisholm *v.* Georgia, 2 Dall. (U. S.) 419, 457.

the author of the clause in its final form,[8] and by other publicists [9] of the time in a sense broad enough to include direct democracy. The same thing is true of the use of the corresponding French words *république* and *républicain* by Montesquieu [10] and apparently by Rousseau,[11] the writings of both of whom had a great influence on American political thought of that period. The political party which advocated keeping the government as close to the people as possible was called, shortly after the formation of the Constitution, the Republican Party.[12] On the other hand, Madison defines a republic as "a government in which the scheme of representation takes place," and contrasts it with a pure democracy.[13] Discussion of the clause under consideration in the constitutional convention indicates that it was directed against insurrection, invasion, and monarchical forms.[14]

The state governments in existence in 1787 must be taken as examples of the republican form, in the sense in which that phrase is used in the Constitution.[15] In spite of the fact that the referendum appears in the formation of some of the state constitutions [16] and in spite of the existence of the New England town government,[17] so close a student of political science as Hamilton believed that the state governments were then wholly representative.[18] Another of the authors of the Federalist, however, points out that the Constitution does not forbid the substitution of other republican forms for those then existing.[19] It seems, on the whole, that "republican" in the Constitution is ambiguous, and that a positive construction that it had a meaning so narrow as to exclude direct legislation cannot be supported.

But even if "Republican Form of Government" does mean representative government, it might well be contended that a slight tincture of direct democracy would not destroy the representative character of a state government.[20] Furthermore, it is probable that the enforcement of the constitutional guaranty is a political question for Congress and the President rather than for the judiciary.[21]

THE CUSTODY OF CHILDREN AND CONFLICT OF LAWS. — The commendable tendency to make the welfare of the children the primary consideration in questions concerning their custody has caused considerable

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[8] See 2 GILPIN, MADISON PAPERS, 1141.

[9] See 1 MADISON, LETTERS AND OTHER WRITINGS, 350; 4 *ibid.* 467; 10 FORD, WRITINGS OF THOMAS JEFFERSON, 28.

[10] See L'ESPRIT DES LOIS, liv. 2, ch. 1, 2.

[11] See CONTRAT SOCIAL, liv. 3, ch. 4.

[12] See HART, FORMATION OF THE UNION, 155, 164.

[13] See THE FEDERALIST, No. 10.

[14] See 2 GILPIN, MADISON PAPERS, 1139–1141.

[15] See Minor *v.* Happersett, 21 Wall. (U. S.) 162.

[16] See LOBINGIER, THE PEOPLE'S LAW, 163–187.

[17] For an argument from this that the guaranty has no application to local government, see Eckerson *v.* Des Moines, 137 Ia. 452.

[18] See THE FEDERALIST, No. 63.

[19] See *ibid.* No. 43, § 6 (Madison).

[20] See State *v.* Pacific States Telephone & Telegraph Co., 53 Ore. 162; Kadderly *v.* City of Portland, 44 Ore. 118.

[21] See Taylor *v.* Beckham, 178 U. S. 548, 578; Luther *v.* Borden, 7 How. (U. S.) 1, 42.

confusion in the rules which govern jurisdiction of this matter. Theoretically, it would seem that the court of the child's domicile should have power to determine its custody, since that sovereign is especially interested in the child's welfare.[1] In fact, however, other courts often assume to decide this question,[2] and owing to the rules which govern an infant's domicile such action is usually entirely proper from the point of view of the child's interests. An unemancipated infant has no power to change his own domicile,[3] which follows that of his natural guardian, the father while living, and on his death, the mother.[4] Therefore if an infant is living apart from his father, the court at his actual residence may be much more competent to designate the person entitled to his custody than the court at his legal domicile. Similarly, where a guardian is appointed at the domicile of an infant who with the guardian's consent is taken to another state where a second guardian is appointed, the first guardian, though his position must be recognized, has no absolute right to the custody of the child.[5] Consequently it would seem that the only way by which a court can retain effective control over an infant for whom it has appointed a guardian, is to forbid his being taken beyond its jurisdiction.[6]

Under these conditions, though the interests of the infant may be well served, some troublesome questions arise as to the position of the guardian. Since a guardian appointed by the court derives all his power from the court, he cannot change his ward's domicile to a place beyond its jurisdiction.[7] If he takes his ward out of the jurisdiction he does not thereby escape his obligations to the court which appointed him, but is still its officer and subject to its commands.[8] But the court which has jurisdiction over the place to which the infant has been taken may see fit to decide the question of his custody for itself. If it also appoints the same guardian, and the two courts make inconsistent orders, the problem is presented — which must he obey?

Similar questions may arise when the custody of the children has been awarded to the mother after a decree of divorce. A court granting a divorce has power, usually given by statute, to make such an award,[9] though not if the children and one of the parents are beyond its jurisdiction.[10] It also, and quite properly, may usually modify the award if

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[1] See *In re* Hubbard, 82 N. Y. 90; SCHOULER, DOMESTIC RELATIONS, § 303.

[2] Johnstone *v.* Beattie, 10 Cl. & F. 42; *Re* Willoughby, 30 Ch. D. 324, where the English court appointed a guardian though the child was domiciled with its mother in France, and had no property in England.

[3] Metcalf *v.* Lowther's Executrix, 56 Ala. 312.

[4] Kennedy *v.* Ryall, 67 N. Y. 379; Dedham *v.* Natick, 16 Mass. 134. See Lamar *v.* Micou, 112 U. S. 452.

[5] Woodworth *v.* Spring, 4 Allen (Mass.) 321. See STORY, CONFLICT OF LAWS, § 499. *Contra*, Nugent *v.* Vetzera, L. R. 2 Eq. 704, where it was held that a foreign guardian, being recognized as such in England, had the absolute right to the custody of the child by English law.

[6] See Miner *v.* Miner, 11 Ill. 43; Jaob *v.* Sheets, 99 Ind. 328. But see Campbell *v.* Campbell, 37 Wis. 206.

[7] Shorter *v.* Williams, 74 Ga. 539; Marheineke *v.* Grothaus, 72 Mo. 204. See Douglas *v.* Douglas, L. R. 12 Eq. 617, 625.

[8] Shorter *v.* Williams, *supra*.

[9] Hoffman *v.* Hoffman, 15 Oh. St. 427; Young *v.* McIntire, 156 Mass. 27.

[10] De la Montanya *v.* De la Montanya, 112 Cal. 101; Kline *v.* Kline, 57 Ia. 386. See 10 HARV. L. REV. 131.

circumstances subsequently require it.[11] It was recently decided that where the decree gave the custody of the children to the mother, a modification of it was proper after she had lived with them for several years in a foreign country, intending to make it her home. *Morrill* v. *Morrill*, 77 Atl. 1 (Conn.). The mother in such a case is in the position of a guardian appointed by the court, over whom it has a continuing jurisdiction.[12] In some cases the exercise of this jurisdiction may be proper even though another court is able to act in the matter. But if another court has taken jurisdiction, it would seem that the first should not interfere; for, owing to the children's absence, it is no longer the best judge of their welfare, and has no power to make its orders effective.[13] Since the father, as natural guardian, can change the legal domicile of his children,[14] it is submitted that if he is given their custody and takes them beyond the jurisdiction of the court granting the divorce, it should have even greater hesitation in interfering than where custody is given to the mother.

ESTATES TAIL IN THE UNITED STATES. — Though the Statute *De Donis* seems out of harmony with American institutions,[1] estates tail were introduced into this country[2] and seem to have been recognized in most jurisdictions[3] till done away with by statute. Fines and recoveries naturally came with the estate.[4] Commonly these methods of barring the entail have been expressly abolished or supplanted by simpler legislative processes,[5] with the probable result that legal estates tail can everywhere easily be barred. On the other hand, it is uncertain whether the tenants of equitable estates tail ever had power to dispose of a fee simple. After fluctuating decisions it was at length established in England that they could do so by such a conveyance as would have been effective had the estate been at law.[6] Since equitable estates tail arose only through analogy to the legal estates, our courts should, it seems, follow this consistent principle, but the only case found in which the point was presented has not done so.[7]

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[11] Campbell *v.* Campbell, *supra;* Harvey *v.* Lane, 66 Me. 536. But see Sullivan *v.* Learned, 49 Ind. 252.

[12] Stanton *v.* Willson, 3 Day (Conn.) 37; Stetson *v.* Stetson, 80 Me. 483. The father is still liable for the support of the children. Pretzinger *v.* Pretzinger, 45 Oh. St. 452. *Contra,* Brow *v.* Brightman, 136 Mass. 187.

[13] See Stuart *v.* Bute, 9 H. L. C. 439, where it was said that although the Scotch and English courts both had jurisdiction, they should act in harmony.

[14] See note 4.

[1] Pierson *v.* Lane, 60 Ia. 60.

[2] 4 KENT'S COMMENTARIES, 14.

[3] The Statute *De Donis* seems never to have been in force in Iowa. Pierson *v.* Lane, *supra.*

[4] Dudley *v.* Sumner, 5 Mass. 438; see Carter *v.* Tyler, 1 Call (Va.) 165, 182.

[5] But a Delaware statute makes it perhaps still possible to employ these old methods. DELAWARE REV. STAT. (1893) 630. The existence of fines and recoveries is doubtful when the only relevant legislation is the abolition of estates tail or the destruction of all forms of action by the enactment of a code of procedure.

[6] North *v.* Champernoon, 2 Ch. Ca. 78; Kirkham *v.* Smith, Ambler 518.

[7] The principal case.

Estates tail have not been favored in this country,[8] and though the law relating to them in England remained practically unchanged by statute until 1834,[9] as early as 1776 Virginia had a statute aimed at their abolition.[10] To-day in most states they have been abolished or easy methods of docking them have been provided.[11] The commonest type of legislation converts what would otherwise be a fee tail into a fee simple.[12] In several jurisdictions a fee simple is created in those coming after the first tenant in tail.[13] Since the necessary result of such statutes is that the first donee has less power to convey than he would have as tenant in tail, they are scarcely an aid to the free disposition of land. In a few states the legislature has made a simple deed sufficient to bar the entail.[14] Many of these acts apply only to persons "seised" of an estate tail,[15] apparently leaving equitable estates unaffected unless the analogy to law is again followed by equity.

The application of such statutes to estates already created has been opposed as impairing vested rights. If common recoveries still existed, a statute which cut down the interest of the first taker to a life estate and thereby destroyed the common-law right to suffer a recovery, would impair a vested property right.[16] But a statute which destroyed the future interests or made them more readily destructible would change merely the mode of breaking the entail and would be constitutional.[17] If a common recovery is impossible, the matter cannot be so easily dismissed. Though the interest of the issue of the tenant in tail is not a vested right,[18] a contingent remainder seems to be in the constitutional sense a vested right.[19] *A fortiori* a reversion or vested remainder comes within the protection of the Fourteenth Amendment. Since there must always be a reversion or a vested remainder in fee simple,[20] these statutes in such a jurisdiction would seem necessarily to impair vested rights. So in Rhode Island, where according to the court equitable estates tail could not be barred by any existing method, a statute which allowed such estates already created to be turned into estates in fee simple was held unconstitutional. *Green* v. *Edwards*, 77 Atl. 188 (R. I.). This results in making

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[8] See Hall *v.* Thayer, 5 Gray (Mass.) 523, 529.

[9] Fines and Recoveries Act, 3 & 4 W. 4. c. 74.

[10] See DEMBITZ, LAND TITLES, 117. At an even earlier date, 1712, *De Donis* ceased to be operative in South Carolina. See GRAY, PERPETUITIES, § 19 n.

[11] See STIMSON, AMER. STAT. LAW, § 1313.

[12] CODE OF ALA. (1907) § 3397. In some of these statutes there is a provision that remainders expectant on the estate tail shall be valid as conditional limitations on a fee simple. 4 CONSOL. LAWS OF N. Y. 4932.

[13] GEN. STAT. OF CONN. (1902) § 4027. There is usually an express provision that the first donee shall take only a life estate. STARR'S ANNOT. STAT. (Ill., 1896) 917.

[14] MASS. REVISED LAWS (1902), 1226. A deed under such a statute is not the exact equivalent of a common recovery. For while a common recovery has been held to let in prior incumbrancers, there is no such incident to this deed. Maslin *v.* Thomas, 8 Gill (Md.) 18.

[15] STARR'S ANNOT. STAT. (Ill., 1896) 917.

[16] See FREUND, POLICE POWER, § 591.

[17] See TIEDEMAN, STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY, 624.

[18] Comstock *v.* Gay, 51 Conn. 45.

[19] See 19 HARV. L. REV. 121.

[20] See GRAY, PERPETUITIES, § 11.

the remainders and reversions practically indestructible. But the land need not remain inalienable; for apparently the tenant in tail might be authorized by statute to convey an interest like a base fee.[21]

THE EFFECT OF LEGITIMATION OF A CHILD ON THE FATHER'S RIGHT TO CURTESY. — By the civil law children born in concubinage were rendered legitimate by the subsequent marriage of their parents.[1] A similar rule exists in the canon law.[2] But from earliest times the common law has been that no act of the parents can render a bastard capable of inheriting.[3] So to-day a child born before its parents marry, though legitimated by the law of its domicile, cannot inherit English land.[4] In most of the United States the more humane doctrine of the civil and canon laws has been, to a greater or less extent, adopted by legislation.[5] The statutes commonly establish legitimacy if there is a marriage between the child's parents and a recognition of the child as his own by the father. Where the acts provide that such children shall be legitimate, without qualification, it has been uniformly held that they are made heritable issue of the same status as children born in wedlock.[6] A recent case arising under a statute of this class [7] raises the question whether the legitimation of a bastard by the marriage of its parents gives the father a right to curtesy in the mother's estate of inheritance. *Bond* v. *Bond*, 16 Va. L. Reg. 411 (Va., Circ. Ct., Pulaski Co.).

The classic statement of the requisites for tenancy by the curtesy is that of Littleton: [8] "In every case where a man taketh a wife seised of such an estate of tenements, etc., as the issue, which he hath by his wife, may by possibility inherit the same tenements of such an estate as the wife hath, as heir to the wife; in this case, after the decease of the wife, he shall have the same tenements by the curtesy of England." This right of the husband has always been a favorite of the common law.[9] It was allowed to defeat the lord's wardship when the feudal law was at its height.[10] It is destroyed neither by the husband's abuse of his wife,[11]

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[21] *Cf.* 4 CONSOL. LAWS OF N. Y. 4932. See GRAY, PERPETUITIES, §§ 35 n., 312.

[1] Inst. 1, 10, 13; 3, 1, 2; Cod. 5, 27, 10; Nov. 12, 4; 78, 3; 89, 8. As to the requirement of the child's consent, see Dig. 1, 6, 11; 1, 7, 5.

[2] It is confined to children born as a result of fornication. Decretal. Gregor. IX, iv, 17, 6, *Tanta est vis matrimonii;* iv, 17, 1, *Conquestus est nobis H.* See MAITLAND, CANON LAW IN ENGLAND, 52–56; 16 HARV. L. REV. 22, 39–42.

[3] See GLANVILL, vii, 13, 15; Stat. Merton, 20 Hen. III, c. 9.

[4] Birtwhistle *v.* Vardill, 7 Cl. & F. 895. See *In re* Goodman's Trusts, 17 Ch. D. 266; *In re* Grey's Trusts, [1892] 3 Ch. 88.

[5] See STIMSON, AM. STAT. LAW, §§ 3151–3155, 6631–6634.

[6] Blythe *v.* Ayres, 96 Cal. 532; Jackson's Adm'rs *v.* Moore, 8 Dana (Ky.) 170; Williams *v.* Williams, 11 Lea (Tenn.) 652; Rice *v.* Efford, 3 Hen. & M. (Va.) 225; Ash *v.* Way's Adm'rs, 2 Grat. (Va.) 203. M'Cormick *v.* Cantrell, 7 Yerg. (Tenn.) 615, is not *contra*, the capacity of the child in that case being determined by a special act of the legislature, which did not expressly "legitimate" him, and which, the court held, had to be construed strictly.

[7] VA. CODE, 1904, § 2553.

[8] LIT. § 52.

[9] See BRITTON, ii, c. 2, § 10; 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 414–417.

[10] See 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, 417–420.

[11] *In re* Coyle's Estate, 1 Lanc. L. Rev. (Pa.) 234.

nor by his deserting her and living in adultery,[12] nor even by a decree of divorce *a mensa et thoro* pronounced against him.[13] In accordance with the policy indicated by these decisions, and inasmuch as the effect of the legitimation statute is to render the once illegitimate issue capable of inheriting from the mother,[14] thus satisfying the requirements of Littleton's definition, one would expect the question proposed to be answered in the affirmative. It was so answered the only time it has been presented to a court of last resort.[15]

The principal case reaches an opposite conclusion, setting up as a requisite for curtesy the birth of issue during coverture. No decision of the highest court of Virginia requires this position.[16] Coke, it is true, says that the husband must plead that he had issue born during the marriage,[17] but this is only because no other fact at common law made the issue heritable. The rule should cease when the reason for it ends. The case on which the court chiefly relies holds merely that the *adoption* of a child gives no right to curtesy.[18] But in that case the difficulty was that the child was not the *issue* of the adopting parent. Even were the matter *res nova*, the policy of the decision should be criticized, in that it removes a potent inducement to legitimate the child.[19]

RIGHT TO RESCIND STOCK SUBSCRIPTIONS OBTAINED BY FRAUD. — Early English cases denied the right of rescission to one who had been induced by the fraud of an agent of a corporation to subscribe for its stock, on the ground that its agents have no authority to make fraudulent representations.[1] Rescission is now, however, universally allowed, generally on the theory that an agent empowered to obtain subscriptions has authority to make such representations,[2] and sometimes on the additional ground that the corporation cannot claim the benefits of the subscription without assuming the representations that procured them.[3] But when the subscription contract was obtained by a promoter before the organization of the corporation, rescission is not allowed; since, first, the relation of agency did not exist because of the non-existence of any principal, and, secondly, ratification of the fraud cannot be presumed in absence of knowledge of it.[4]

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[12] Wells *v.* Thompson, 13 Ala. 793. See Sidney *v.* Sidney, 3 P. Wms. 269, 276.
[13] Smoot *v.* Lecatt, 1 Stew. (Ala.) 590.
[14] See cases cited, note 6.
[15] Hunter *v.* Whitworth, 9 Ala. 965.
[16] See Carpenter *v.* Garrett, 75 Va. 129; Breeding *v.* Davis, 77 Va. 639.
[17] See Co. LIT. 29 b.
[18] Murdock *v.* Murdock, 74 N. H. 77.
[19] A contrary decision in the principal case would not give curtesy to the father of a bastard, by statute made its mother's heir, without the marriage of the parents, for a man can have curtesy only in the lands of his wife.

[1] Royal British Bank, *ex parte* Nicol, 5 Jur. N. S. 205. It was necessary that the fraud of the agent be acquiesced in at a general meeting. Ayre's Case, 25 Beav. 513.
[2] Waterhouse *v.* Jamieson, L. R. 2 H. L. Sc. 29; Waldo *v.* R. R. Co., 14 Wis. 575.
[3] Henderson *v.* R. R. Co., 17 Tex. 560. See COOK, CORPORATIONS, § 140.
[4] Oldham *v.* Mt. Sterling, etc. Co., 103 Ky. 529. *Contra*, McDermott *v.* Harrison, 9 N. Y. Supp. 184. See 16 HARV. L. REV. 380.

Of course the right of rescinding the contract for fraud may be exercised only when it is equitable so to do. Hence it cannot be done after the rights of innocent third parties have intervened. But there is no general principle that the rights of creditors of the fraudulent party after the latter's insolvency are superior to the defrauded party's right to rescind.[5] A recent case in Georgia, therefore, seems correct in allowing rescission even after the corporation had become insolvent and a receiver had been appointed. *Gress* v. *Knight*, 68 S. E. 834 (Ga.). It is well settled in England, on the contrary, that rescission will not be allowed after proceedings have been taken to liquidate the corporation's affairs.[6] This result may be attributed to the construction of the Companies Act.[7] Even in the absence of statutes, some courts in this country have squarely adopted the English rule.[8] Rescission has more often not been allowed because of the existence of other equitable grounds for denying such relief. Thus it has been refused when the subscriber has unnecessarily delayed availing himself of this remedy, since it would be inequitable to allow him to retain the option of affirming or rescinding according to which course should prove ultimately the more advantageous.[9] And it is well settled that once he is put on inquiry, he must use due diligence to discover whether he has been defrauded.[10] There have, indeed, been *dicta* making the fault of the defrauded party the only bar to the exercise of the right.[11] In the cases, however, where rescission has actually been allowed, it has not appeared that any new and substantial liabilities were incurred after the subscriber contracted to take stock.[12] As is said in the principal case,[13] the fact that such liabilities had been created should destroy the right to rescind; for a subscriber to stock must know that future creditors of the corporation will rely on his apparent relation to it as a stockholder, as shown by the amount of outstanding capital stock. Therefore when these are subsequent creditors, he should be prevented, after insolvency of the corporation, from escaping his liability to the corporation as a stockholder.[14]

Evidence of Other Crimes to Prove the Defendant Guilty of the Crime Charged. — Evidence of the defendant's having committed a crime like that for which he is on trial will not be admitted merely because of this similarity.[1] For it by no means follows from the defendant's once having been induced to perpetrate an offense, that he would do it

[5] Donaldson *v.* Farwell, 93 U. S. 631.
[6] Oakes *v.* Turquand, L. R. 2 H. L. 325.
[7] The Companies Act of 1862, 25 & 26 Vict. c. 89, §§ 23, 38, 74, provides that any person who has agreed to become a member shall be a contributory.
[8] Moosbrugger *v.* Walch, 89 Hun (N. Y.) 564.
[9] *In re* Estates Investment Co., L. R. 9 Eq. 263.
[10] Tierney *v.* Parker, 58 N. J. Eq. 117.
[11] Upton *v.* Englehart, 3 Dill. (U. S.) 496, 502.
[12] Newton Nat. Bank *v.* Newbegin, 74 Fed. 135; Stufflebeam *v.* De Lashmutt, 83 Fed. 449.
[13] See also Stewart *v.* Rutherford, 74 Ga. 435.
[14] Stufflebeam *v.* De Lashmutt, *supra*.

[1] People *v.* Molineux, 168 N. Y. 264; Boyd *v.* United States, 142 U. S. 450.

again under, perhaps, entirely different circumstances.[2] Furthermore, admission of the evidence would complicate the issues, and prejudice the defendant with the jury.[3] But if the evidence is admissible for some other reason, it will not be rejected merely because it tends to prove the defendant guilty of a crime other than that charged.[4] The first reason for admitting this kind of evidence is to show the state of mind with which the defendant did the principal act, which in these cases he is admitted to have done. Here, the offered evidence is to the effect that he did similar acts with a certain state of mind which is sought to be imputed to the principal act.[5] In the second place, if several criminal acts are all part of one scheme, evidence that the defendant has done some of the other acts is admissible to prove the commission of the act in question.[6] Thirdly, if the evidence shows he committed another crime, and that the same person committed both that and the one which is the subject of the trial, it will be admitted for purposes of identification.[7] In all these cases, it should be observed that the evidence does not merely show that the defendant is a wicked man and therefore likely to commit the crime charged, but bears directly on his guilt in the principal offense.

Two recent cases illustrate another ground on which evidence of other crimes is frequently admitted. In *People* v. *Boero*, 110 Pac. 525 (Cal., Ct. App.), the defendant was indicted for statutory rape, and evidence of previous intercourse with the prosecutrix was admitted; while in *Pridemore* v. *State*, 129 S. W. 1112 (Tex., Ct. Cr. App.), an indictment for incest, such evidence was excluded. The authorities practically unanimously support the former case.[8] The evidence in such cases is introduced to prove the defendant guilty of committing the act charged, and not to show his mental attitude in doing what he was proved to have done, nor to connect the principal act with other parts of a general plan, nor to identify the accused. Its admission is based on the theory that it shows a disposition on the part of the defendant to commit such acts with the prosecutrix, and hence that he is likely to indulge his passion whenever the opportunity is presented.[9] Undoubtedly, the difficulty of proving these charges because the prosecutrix is generally the sole witness has induced the courts to be more ready to accept the evidence.[10] Since the true ground of admission is that it shows a passion for this woman, it should be immaterial whether this feeling was proved by previous or subsequent acts.[11] Furthermore, it is no objection that

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[2] Shaffner *v.* Commonwealth, 72 Pa. St. 60.

[3] Commonwealth *v.* Jackson, 132 Mass. 16.

[4] Regina *v.* Richardson, 2 Fost. & Fin. 343; People *v.* Peckens, 153 N. Y. 576.

[5] For example, other acts may show that the defendant had a specific intent to defraud, Bainbridge *v.* State, 30 Oh. St. 264, Commonwealth *v.* Lubinsky, 182 Mass. 142; or it may show simply that he had *mens rea*, Commonwealth *v.* Birriolo, 197 Pa. St. 371.

[6] Commonwealth *v.* Robinson, 146 Mass. 571; Commonwealth *v.* Roddy, 184 Pa. St. 274.

[7] Yarborough *v.* State, 41 Ala. 405; People *v.* Ebanks, 117 Cal. 652.

[8] People *v.* Patterson, 102 Cal. 239; Lawson and Swinney *v.* State, 20 Ala. 65.

[9] State *v.* Briggs, 68 Ia. 416; People *v.* Edwards, 73 Pac. 416 (Cal.).

[10] State *v.* Snover, 64 N. J. L. 65.

[11] Thayer *v.* Thayer, 101 Mass. 113; *contra*, Lovell *v.* State, 12 Ind. 18.

the previous offense is barred by the statute of limitations,[12] or was committed in another jurisdiction.[13] But evidence of similar acts with other women is not admissible.[14] It may be said that one who is accustomed to indulge his passions with women generally is more likely to have done so with a particular woman. But the probability is not so strong as in the principal cases. Moreover, evidence of promiscuous intercourse is nothing but evidence of bad character which is excluded whatever its probative force.[15]

RECENT CASES.

ADMIRALTY — TORTS — DAMAGES RECOVERABLE FROM ONE OF TWO VESSELS AT FAULT. — In a collision between vessels A and B in which both were at fault, the cargo on A was damaged. An action was brought, and both vessels were in court. The cargo-owner could probably recover nothing from A. *Held*, that he can recover from B only half of the amount of his damage. *The Drumlanrig*, [1910] P. 249.

At common law, a person damaged by the tort of several tortfeasors can usually get full compensation from any one of them. See *Halsey* v. *Woodruff*, 9 Pick. (Mass.) 555. But *cf.* 23 HARV. L. REV. 406. In the old English admiralty court, however, it was held that only one-half could be recovered from either of two vessels at fault. *The Milan*, Lush. 388. The latest case follows this decision only because it is regarded as establishing an admiralty rule within the meaning of sec. 25, sub-sec. 9 of the Judicature Act, 1873, two of the lords justices admitting that it is indefensible on principle. See *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521. In this country, if both vessels are in court and each is able to pay half, a decree is entered for a moiety against each. *The Sterling and The Equator*, 106 U. S. 647; *The Washington and The Gregory*, 9 Wall. (U. S.) 513. But where the libellant cannot be made whole in this way, the more valuable vessel is held for the balance. *The Alabama and The Game-Cock*, 92 U. S. 695. And even if he libels but one vessel, he is allowed complete compensation from its proceeds, the libellee then having a right of contribution from the other tortfeasor. See *Erie R. Co.* v. *Erie & Western Transportation Co.*, 204 U. S. 220. The same rights are given even where a shipper is barred by the Harter Act from recovering anything against one of the vessels. See 16 HARV. L. REV. 171–177. But see HUGHES, ADMIRALTY, 278, 279. And *cf. The Maine*, 161 Fed. 401.

ALIENS — NATURALIZATION — "FREE WHITE PERSONS." — A Parsee applied for naturalization. *Held*, that he should be admitted. *United States* v. *Balsara*, 180 Fed. 694 (C. C. A., Second Circ.).

For a discussion of the principles involved, see 23 HARV. L. REV. 561.

BANKRUPTCY — PROVABLE CLAIMS — RENT ON UNEXPIRED LEASE. — A lease provided that the lessor could reënter if the rent was not paid or the lessee became bankrupt, and that the lessee should pay the difference between the rent reserved and that collectible from other sources. The lessee became

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[12] Taylor *v.* State, 110 Ga. 150.
[13] State *v.* Snover, *supra*.
[14] McAllister *v.* State, 112 Wis. 496; Nicholizack *v.* State, 75 Neb. 27.
[15] State *v.* Lapage, 57 N. H. 245.

bankrupt, and the lessor leased the premises to another at a lower rent than that reserved, and filed a claim against the bankrupt's estate for the difference. *Held*, that the claim is not provable in bankruptcy. *Matter of Roth & Appel*, 24 Am. B. Rep. 588 (C. C. A., Second Circ.). *Held*, that the claim is provable. *In re Caloris Mfg. Co.*, 179 Fed. 722 (Dist. Ct., E. D. Pa.).

Under section 63a of the Bankruptcy Act of 1898, debts may be proved which are "(1) a fixed liability, . . . absolutely owing at the time of the filing of the petition; . . . (4) founded upon a contract." What contingent claims are provable in bankruptcy is still unsettled. See 23 HARV. L. REV. 636. Claims for unaccrued rent, however, are incapable of being proved. *Watson* v. *Merrill*, 136 Fed. 359; *In re Mahler*, 105 Fed. 428. Regarding the claim in the present case as one of indemnity for loss of rent, it would be desirable to allow it to be proved, for the bankrupt would be thereby released from future liability and the lessor protected. But by the accepted construction of the Bankruptcy Act, the first and fourth clauses of section 63a must be taken together, and the debt founded upon a contract must be a fixed liability absolutely owing at the time of the filing of the petition. *In re Adams*, 130 Fed. 381. Hence the claim should not be provable.

CONFLICT OF LAWS — MAKING AND VALIDITY OF CONTRACTS — WHAT LAW GOVERNS INDORSEMENT. — A note made by a husband, payable to the order of his wife, was indorsed by her for his accommodation and delivered by him in New York. The note was dated and payable in New Jersey. *Held*, that the law of New Jersey governs the validity of the indorsement, and that there can be no recovery from the wife. *Basilea* v. *Spagnuolo*, 77 Atl. 532 (N. J., Sup. Ct.).

A married woman cannot be held as an accommodation indorser in New Jersey. GEN. STAT. N. J., TIT. MARRIED WOMEN, § 26. But the capacity of a married woman to contract depends on the law of the place where the contract is made. *Milliken* v. *Pratt*, 125 Mass. 374. A contract of indorsement is made where the note is delivered. *Briggs* v. *Latham*, 36 Kan. 255; *Stubbs* v. *Colt*, 30 Fed. 417. Even when the note is payable at a particular place the contract of indorsement, being a distinct contract from that of the maker, is made where delivery is made and is governed by the laws of that place. STORY, CONF. OF LAWS, 8 ed., § 315. In the principal case, therefore, the contract of indorsement was made in New York, and by the law governing the capacity of married women there the defendant was liable. N. Y. CONSOL. LAWS, 1909, c. 19, § 51. The decision is therefore erroneous, unless it can be sustained on the ground that a contract valid in New York will not be enforced by the New Jersey courts if it is condemned by the positive law of the state, or inconsistent with the public policy thereof as declared by the legislature. *Thompson* v. *Taylor*, 65 N. J. L. 107.

CONFLICT OF LAWS — PERSONAL JURISDICTION — JURISDICTION TO AWARD THE CUSTODY OF CHILDREN. — A woman obtained a divorce from her husband in Connecticut, and was given the custody of their children. Afterwards she went with them to Germany, intending to make her home there. Some years later, at the petition of the father, the decree for the custody of the children was modified so as to require the mother to send them to the father every year for a visit. *Held*, that this modification is proper. *Morrill* v. *Morrill*, 77 Atl. 1 (Conn.). See NOTES, p. 142.

CONSTITUTIONAL LAW — MAKING AND CHANGING CONSTITUTIONS — MATTER APPROPRIATE FOR CONSTITUTION. — The Missouri constitution provides for the initiation of constitutional amendments by popular petition. The Secretary of State refused to file a petition for an amendment fixing legislative districts for ten years. *Held*, that he need not file the petition, (1) be-

cause it does not in form comply with requirements of the constitution, and (2) because the subject matter, being temporary in character, is appropriate not for a constitutional provision but for a statute. *State ex rel. Halliburton* v. *Roach*, 130 S. W. 689 (Mo.).

There are undoubtedly many provisions in the state constitutions which, from the view-point of political science, belong properly in the field of legislative enactment. See 1 BRYCE, AMERICAN COMMONWEALTH, ch. 37. But if the principal case can be rested on the second ground, it seems to follow that such provisions, although formally made a part of the constitution, are really not such, and can be repealed by the legislature, a result for which hardly any one would contend.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — THE REFERENDUM. — The Wisconsin legislature passed a direct primary law and provided that it should go into effect only if ratified by a majority of the votes cast at the next general state election. *Held*, that the statute is constitutional. *State ex rel. Van Alstine* v. *Frear*, 142 Wis. 320. See NOTES, p. 141.

CONTRIBUTORY NEGLIGENCE — PERSONS UNDER DISABILITY — WHETHER MENTAL CAPACITY OF ADULT PERSON MAY BE CONSIDERED. — In an action against a street railway company for personal injuries alleged to have been caused by the defendant's negligence, the jury was instructed that in determining whether the plaintiff had been guilty of contributory negligence the fact that the plaintiff's mental capacity was less than that of the average adult person should be considered. *Held*, that the instruction is correct. *Hovden* v. *Seattle Electric Co.*, 180 Fed. 487 (Circ. Ct., W. D. Wash.).

This decision is contrary to the universal rule that every adult, who is neither so insane nor so imbecile as to be utterly incapable of taking precautions, is held to the degree of care which is exercised by men of ordinary prudence under similar circumstances. *Davis, Adm'x* v. *Concord & Montreal R. Co.*, 68 N. H. 247; *Worthington & Co.* v. *Mencer*, 96 Ala. 310. The case is not in accord with the law as laid down by the state courts of Washington. See *Williams* v. *Ballard Lumber Co.*, 41 Wash. 338, 345. The opinion is based upon a case which is plainly distinguishable as involving only the question of a child's negligence. *Baltimore & Potomac R. Co.* v. *Cumberland*, 176 U. S. 232. A child's duty of care is not measured by the adult standard. In some cases the degree required is stated to be that which an ordinarily prudent child of the same age would exercise under similar circumstances. *Rolling Mill Co.* v. *Corrigan*, 46 Oh. St. 283. In other cases, the mental and physical maturity and capacity of the child, besides the age, have determined responsibility. *Illinois Iron & Metal Co.* v. *Weber*, 196 Ill. 526; *Western & Atlantic R. Co.* v. *Young*, 81 Ga. 397. Exactly what is the child's standard is thus an open question. But the adult standard takes no account of the personal equation, and the principal case seems clearly wrong.

CORPORATIONS — ACQUISITION OF MEMBERSHIP — EFFECT OF INSOLVENCY OF CORPORATION ON RIGHT TO RESCIND STOCK SUBSCRIPTION FRAUDULENTLY OBTAINED. — Certain persons were fraudulently induced to subscribe for stock in a banking corporation which shortly afterwards made an assignment for the benefit of creditors. In proceedings for the appointment of a receiver, these persons intervened with a petition that their contracts be rescinded. *Held*, that they may rescind. *Gress* v. *Knight*, 68 S. E. 834 (Ga.). See NOTES, p. 147.

CORPORATIONS — CAPITAL, STOCK, AND DIVIDENDS — STOCK ISSUED IN PAYMENT FOR OVERVALUED PROPERTY. — The stockholders of two corporations entered into an agreement of consolidation. Corporation X was to issue

$2,500,000 of stock and give over $1,000,000 cash in payment for $1,000,000 par value of the stock of corporation Y. The exchange of stock was effected, and certificates issued for the $1,000,000 cash. Suit was brought on some of these certificates. *Held*, that the contract of consolidation was against public policy and no agreement relating thereto will be enforced. *Strickland* v. *National Salt Co.*, 76 Atl. 1048 (N. J., Ct. Ch.).

In the absence of statute, an issue of watered stock is not illegal and void *per se*. *Scovill* v. *Thayer*, 105 U. S. 143, 153. Payment for stock may usually be made in property, and the exchange of shares in one corporation for those in another is one form of property payment. According to the "true value" rule, however, an overvaluation of the property leaves the stock unpaid to the extent of the overvaluation, and stockholders are liable to make up the deficiency in favor of creditors of the corporation. *Van Cleve* v. *Berkey*, 143 Mo. 109. Some courts insist that it is sufficient if there is good faith in the valuation of the property, and hold the stock valid even as against creditors. *Coffin* v. *Ransdell*, 110 Ind. 417. As between the corporation and the stockholders, there seems no good reason why any agreed valuation may not be accepted, provided there is no fraudulent concealment of facts. *Higgins* v. *Lansingh*, 154 Ill. 301. See *Lorillard* v. *Clyde*, 86 N. Y. 384. A previous New Jersey case did not question the validity of an agreement where fourteen shares of stock of the consolidated company were given in exchange for one share of one of the constituent companies. *Trenton Passenger Ry. Co.* v. *Wilson*, 55 N. J. Eq. 273.

CURTESY — HERITABLE ISSUE — LEGITIMATION BY SUBSEQUENT MARRIAGE. — The father of an illegitimate child married her mother and recognized the child as his daughter. Under the Virginia statute this rendered the child legitimate. No other issue was born to the parents. The mother was seised of an estate of inheritance, and died. *Held*, that the father is not entitled to curtesy. *Bond* v. *Bond*, 16 Va. L. Reg. 411 (Va., Circ. Ct., Pulaski Co.). See NOTES, p. 146.

DOWER — RIGHT OF DOWER IN MORTGAGED PROPERTY AFTER EXTINGUISHMENT OF MORTGAGE. — G and his wife, the plaintiff, made a joint and several bond to pay G's debt, and as security G gave a mortgage of land owned by him, the plaintiff renouncing her dower therein. Subsequently G conveyed the land in satisfaction of the mortgage. The present action was brought against the vendee to recover dower. *Held*, that the plaintiff is entitled to dower. *Gainey* v. *Anderson*, 68 S. E. 888 (S. C.).

Where a wife joins with her husband in a conveyance of his land, she is a party thereto only for the purpose of relinquishing her dower, which is regarded as a release of a contingent right incident to the principal conveyance, and continuing only so long as that exists. *Rickard* v. *Talbird*, Rice Eq. (S. C.) 158. If the mortgage is extinguished by operation of law, as when it is set aside as a fraud on creditors, the right of dower revests forthwith. *Munger* v. *Perkins*, 62 Wis. 499. The result is the same if the debt is satisfied by the mortgagor, or by his administrator after his decease. *Hastings* v. *Stevens*, 29 N. H. 564. Hence the case is correct in holding that the satisfaction of the mortgage debt by a transfer of the husband's equity of redemption revests the wife's right of dower. The result is a just one, since the wife is to be regarded as a surety for the husband's debt, and has been allowed to compel an application of the husband's share of the proceeds derived from a judicial sale of the property to the payment of the debt before resort is had to her interest. *Mandel* v. *McClave*, 46 Oh. St. 407.

ESTATES TAIL — STATUTORY CHANGES. — A statute provided that equitable estates tail and reversions and remainders expectant thereon could be barred

by a deed of the tenant in tail. The statute, so far as it related to remainders and reversions existing at the time of its passage, was attacked as permitting a taking of property without due process of law. *Held*, that it is unconstitutional. *Green* v. *Edwards*, 77 Atl. 188 (R. I.). See NOTES, p. 144.

EVIDENCE — SIMILAR FACTS AND OCCURRENCES — CRIMES RESULTING FROM SIMILAR MOTIVE AS PROOF OF CRIME AT ISSUE. — The defendant was indicted for statutory rape. *Held*, that evidence of prior intercourse between the parties is admissible. *People* v. *Boero*, 110 Pac. 525 (Cal., Ct. App.).

The defendant was indicted for incest. *Held*, that evidence of prior intercourse between the parties is inadmissible. *Pridemore* v. *State*, 129 S. W. 1112 (Tex., Ct. Cr. App.). See NOTES, p. 148.

GENERAL AVERAGE — NATURE, CAUSE, AND MANNER OF SACRIFICE — EFFECT OF INHERENT VICE OF CARGO UPON RIGHT TO CONTRIBUTION. — A cargo of garbage tankage took fire by spontaneous combustion, and the rest of this cargo was destroyed in putting out the fire, to save the common venture. Neither the cargo-owner nor the ship-owner knew of its dangerous character. The plaintiff insurance company had to indemnify the cargo-owner, and libelled the vessel for a general average contribution. *Held*, that the plaintiff is entitled to this contribution. *The Wm. J. Quillan*, 180 Fed. 681 (C. C. A., Second Circ.).

This reverses a former decision in the same case. See 23 HARV. L. REV. 483; 22 *id.* 452; and for a discussion of the principles involved, 21 *id.* 369.

GIFTS — CAUSA MORTIS — EFFECT OF SUBSEQUENT WILL. — Several days before his death a testator made to the plaintiff a *donatio causa mortis* of three deposit notes amounting to £2,000, and the same day made a will bequeathing her £2,000. The plaintiff sued for the sum secured by the deposit notes. The defendant, the executor of the will, contended that the legacy satisfied the *donatio*. *Held*, that the plaintiff can recover. *Hudson* v. *Spencer*, 54 Sol. J. 601 (Eng., Ch. D., June 8, 1910).

One early case holds that a subsequent will may satisfy a debt thus created. *Jones* v. *Selby*, Prec. Ch. 300. But there the *donatio*, being made three years before the testator's death, was hardly *causa mortis*, and the decision scarcely warrants the contention that a bequest of a similar amount revokes a preceding death-bed gift. And a later will leaving the same *res* to a different person does not revoke the gift. *Nicholas* v. *Adams*, 2 Whart. (Pa.) 17. *Contra*, *Jayne* v. *Murphy*, 31 Ill. App. 28. This is justified on the ground that title to the gift becomes absolute at the moment of death, so that the will has no effect on it. In England the death of the donor is a condition precedent to the vesting of title in the donee. *Tate* v. *Hilbert*, 2 Ves. Jr. 111. But in most American jurisdictions a defeasible title vests at once. *Emery* v. *Clough*, 63 N. H. 552. It is universally agreed, however, that the gift is revocable by the donor during life. *Parker* v. *Marston*, 27 Me. 196. It is therefore argued that the intent to revoke is shown by the similarity of the bequest to the gift. *Jayne* v. *Murphy*, *supra*. But such a decision is in direct conflict with the kindred rule governing bequests contained in both a will and codicil. *Roch* v. *Callen*, 6 Hare 531.

HUSBAND AND WIFE — WIFE'S SEPARATE ESTATE — ESTATE BY ENTIRETY: WHETHER JUDGMENT DEBT OF HUSBAND BECOMES LIEN ON THE LAND. — A husband and wife held an estate by the entirety in mortgaged land. The property was sold under a decree of foreclosure, and judgment creditors of the husband claimed a lien on the surplus funds. The husband and wife petitioned to have the surplus paid to them. *Held*, that it shall remain in court to await severance of the estate by death, then to go to the wife or the husband's cred-

itors accordingly as the husband or wife dies first. *Servis* v. *Dorn*, 76 Atl. (N. J.) 246.

At common law the husband had full rights in an estate by the entirety during the joint lives of himself and wife, except that he could not defeat the wife's right of survivorship. *Washburn* v. *Burns*, 34 N. J. L. 18. The married woman's property acts gave the wife the right to enjoy her estate during coverture. *Hiles* v. *Fisher*, 144 N. Y. 306. This did not abolish estates by the entirety. It did, however, limit the husband's rights to possession during their joint lives. Thereafter the husband and wife had each a right to the profits of an undivided half, the fee passing to the survivor. *Buttlar* v. *Rosenblath*, 42 N. J. Eq. 651. It seems that the decree in the principal case, while it recognizes this separate right in the wife, should have more fully protected it. Judgment creditors of the husband could acquire no hold on her interest. She was entitled to one-half the interest of the surplus. There should also be provision for partition in case the estate is severed otherwise than by death, *e. g.*, by divorce. She would then become a tenant in common with her husband. *Stelz* v. *Shreck*, 128 N. Y. 263. *Cf. Mardt* v. *Scharmach*, 65 N. Y. Misc. 124.

Injunctions — Acts Restrained — Infringement of Patent by Public Officers. — The complainant filed a bill to restrain county commissioners from using, in a courthouse, a ventilating device which infringed on his patent. *Held*, that the injunction should not be granted. *McCreery Engineering Co.* v. *Massachusetts Fan Co.*, 180 Fed. 115 (Circ. Ct., D. Mass.).

In the United States the sovereign has no right to use patented inventions without compensation to the patentee. *James* v. *Campbell*, 104 U. S. 356. Yet the sovereign cannot be sued without its consent. Hence it has been held by the Supreme Court that if patented articles have come into the possession of the government, agents using them for the government cannot be enjoined from so doing, on the ground that such an injunction would in substance be directed against the sovereign. *Belknap* v. *Schild*, 161 U. S. 10. If it be conceded that a courthouse is an agency of the state the principal case would seem correct, even though it permits individuals to continue doing admittedly wrongful acts. The patentee is not without remedy, for he can recover from the commissioners the damages he has sustained. Even if agents are expressly authorized by government officials to commit illegal acts they are personally liable for the consequences in actions at law. *Bates* v. *Clark*, 95 U. S. 204.

Insurance — Construction and Operation of Conditions — Insurance Broker as Agent of Insured to Pay Premiums. — An insurance policy containing a stipulation that it should become null and void upon the dishonor of any note given in payment, was issued by the defendant company's agent to the plaintiff. A note for the first premium, payable to the agent, was received by him and held until maturity. The defendant company issued a receipt, acknowledging payment, forwarded it to the agent and charged his account with the amount. Subsequently the note was dishonored. *Held*, that the policy was not rendered invalid. *Perea* v. *State Life Insurance Co.*, 110 Pac. 559 (N. M.).

Whether such a policy is forfeited depends on a nice determination as to where the loss from the non-payment of the note primarily falls. If the note has been endorsed to the company, its dishonor would render the policy void. *Fidelity Mutual Life Insurance Co.* v. *Bussell*, 75 Ark. 25. If it was retained by the agent and he was debited on the books of the company with the amount, although with the understanding that the company would save him harmless, then the validity of the policy cannot be impaired. *Southern Mutual Life Insurance Co.* v. *Best*, 8 Ky. L. Rep. 535. Granting that these two cases, so nearly similar, correctly state the law, they mark the exact line of distinction;

for the first does and the second does not come within the literal terms of the forfeiture clause. In the latter, as in the principal case, no note was received by the company. It elected to treat the broker as the agent of the assured, and took payment by deducting a sum from his accounts. Another recent case supports this reasoning, *Williams* v. *Empire etc. Insurance Co.*, 68 S. E. 1082 (Ga.).

INTERSTATE COMMERCE — CONTROL BY CONGRESS — FEDERAL EMPLOYERS' LIABILITY ACT OF 1908. — The Federal Employers' Liability Act of April 22, 1908, provides that "every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier. . . ." *Held*, that the statute is constitutional in so far as it applies to the negligence of employees engaged at the time in interstate commerce. *Zikos* v. *Oregon R. & Navigation Co.*, 179 Fed. 893 (Circ. Ct., E. D. Wash.).

The court follows a *dictum* of a majority of the Supreme Court that an employers' liability act is a rightful exercise of the power of Congress to regulate interstate commerce. See *The Employers' Liability Cases*, 207 U. S. 463, 495; 21 HARV. L. REV. 290; 22 *id.* 38. A former act of Congress attempting to regulate this matter was declared unconstitutional because it inseparably included intrastate commerce. *The Employers' Liability Cases*, *supra*. The present act is so worded as to allow employees engaged in interstate commerce to recover for injuries caused by fellow-servants whether the latter are so employed or not. The court holds that the act is separable, and valid at least in part. The test in such a case is whether the legislative body would have passed the part in question alone. *Illinois Central R. R.* v. *McKendree*, 203 U. S. 514. In the principal case the court considers it beyond controversy that the two classes of employees were not inseparably embraced within the statute. No opinion is expressed as to whether there could be recovery if the injury were caused by the negligence of an employee not engaged in interstate commerce.

JUDGMENTS — OPERATION AGAINST THIRD PARTIES — CONCLUSIVENESS AS TO PERSONS NOT PARTIES TO SUIT. — A conveyed land to B for life, and then to the heirs of her body. Purchasers from B and her daughter brought various suits against them to quiet title, and judgment was rendered for the purchasers. In eminent domain proceedings, the question arose as to whether the grandchildren of B were concluded by these judgments. *Held*, that as the grandchildren, not then *in esse*, were not parties to the suits, they are not bound by the decrees. *Los Angeles County* v. *Winans*, 109 Pac. 640 (Cal.).

By the California Code, the Rule in Shelley's Case is abolished, so that B's grandchildren take by purchase, not by descent. CAL. CIV. CODE, 1906, § 779. Hence if they were barred it was not by the sale but by the judgments. In equity all who will be affected by the decree are necessary parties. But when a particular party, though not personally before the court, is so represented by others that his interest is fully protected, the decree binds him. *Hale* v. *Hale*, 146 Ill. 227. Where estates in land are limited over to persons not *in esse*, their interests are represented by the living owner of the first estate of inheritance, or if there is no such person, by the life tenant. *Giffard* v. *Hort*, 1 Sch. & Lef. 386. This doctrine of virtual representation, however, will not apply, unless the interests of the represented and the representative are identical, so that motives of self-interest will induce the latter thoroughly to contest the question. *Downey* v. *Seib*, 185 N. Y. 427. By their sale, B and her daughter became hostile to the remaindermen's interest, and therefore did not represent them in these suits.

LANDLORD AND TENANT — TENANCIES FROM YEAR TO YEAR — POSSESSION UNDER AGREEMENT TO LEASE. — A tenant was in possession under an agreement to execute a lease for three years at an annual rental, payable part in monthly instalments, and the balance at the end of the year. The lease was not executed, but the tenant remained in possession, paying no rent until the second month of the second year. At this time he paid all rent due, on the agreed basis; and from then on paid the monthly installments for eight months. *Held*, that he was not a tenant from year to year. *Gault* v. *Gault*, 127 N. W. 297 (Mich.).

It is universally held that when a man goes into possession under an agreement to execute a lease, there is created a tenancy at will, which ripens into a tenancy from year to year if rent is paid on an annual basis. *Knight* v. *Benett*, 3 Bing. 361; *Laughran* v. *Smith*, 75 N. Y. 205. Or if a tenant for years holds over, the landlord can make him a tenant from year to year by so electing. Accepting rent on an annual basis is conclusive of the landlord's election to treat him as a tenant from year to year. *Schneider* v. *Lord*, 62 Mich. 141; *Dorr* v. *Barney*, 12 Hun (N. Y.) 259. This is not altered in either case by the fact that the rent is paid by the month. *Scully* v. *Murray*, 34 Mo. 420; *Koplitz* v. *Gustavus*, 48 Wis. 48. The facts in the principal case would seem to create one of the above situations.

MARRIAGE — NULLIFICATION — MISREPRESENTATIONS AS TO PRIOR CHASTITY. — A woman represented to her intended husband that she had been the wife of a man then deceased, and that he was the father of her child. In fact, she had been his mistress and the child was a bastard. *Held*, that the husband can secure an annulment of the marriage on the ground of fraud. *Domschke* v. *Domschke*, 138 N. Y. App. Div. 454.

Marriage is more than a contractual relation, it is a status. Once entered, it should be dissolved only for the gravest reasons. All courts agree that in extreme cases fraud as to material facts may vitiate consent and make the marriage voidable. As to what facts are material there is considerable conflict. The English rule, that nothing is material except the identity of the parties and permanent physical incapacity to consummate the marital relation, while simple, is unnecessarily harsh in individual cases. *Moss* v. *Moss*, [1897] P. 263. In this country the courts have exercised wider discretion, giving relief on equitable principles in cases of extreme hardship. *Reynolds* v. *Reynolds*, 3 Allen (Mass.) 605; *Ryder* v. *Ryder*, 66 Vt. 158. *Cf. Franke* v. *Franke*, 31 Pac. 571 (Cal.). Wherever the point has been raised, all courts except New York seem to agree that representations as to social position or moral character cannot be material. *Wier* v. *Still*, 31 Ia. 107. *Contra*, *Keyes* v. *Keyes*, 6 N. Y. Misc. 355; *King* v. *Brewer*, 8 N. Y. Misc. 587. Even in New York, no case ever held prior unchastity material. See *Shrady* v. *Logan*, 17 N. Y. Misc. 329. Authority in other states is opposed to it. *Leavitt* v. *Leavitt*, 13 Mich. 452; *Varney* v. *Varney*, 52 Wis. 120. See *Reynolds* v. *Reynolds*, *supra*. No analogy can be drawn from breach of promise actions. On grounds of public policy the wisdom of the doctrine of the principal case may well be questioned.

MARRIAGE — VALIDITY — VOID MARRIAGE MADE VALID BY REMOVAL OF IMPEDIMENT. — A married B in 1868. In 1881 he married C who believed herself to be his lawful wife. A knew that B was living, and from 1900 until his death in 1904 sent money for her use. B died in 1903 but A never knew of it. In a judicial settlement of A's estate, the court below charged the jury that if C acted in good faith, the law would consider her the lawful widow on the ground that a common-law marriage occurred in 1903. Judgment for C was affirmed by necessity, the court being evenly divided. *In re Fitzgibbons' Estate*, 127 N. W. 313 (Mich.).

Mutual consent and competency are the requisites of a valid marriage. MICH. COMP. LAWS, 1897, § 8589. This statute is declaratory of the common law. If both parties are innocent, there is a presumption that a marriage, void because of the incompetency of either party, becomes a lawful marriage on the removal of the impediment. *De Thoren* v. *Attorney-General*, 1 App. Cas. 686. Consent is inferred from the relation; but by the weight of authority, when one or both are guilty, apparent consent will not suffice, but there must be evidence of a real matrimonial intent. *Gall* v. *Gall*, 114 N. Y. 109; *Cartwright* v. *McGown*, 121 Ill. 388. *Contra*, *Barker* v. *Valentine*, 125 Mich. 336. In the principal case, A's intent at the outset was to deceive B, — to live with her with the appearance of being married. To infer a change of intent because of B's death in 1903, a fact unknown to A, seems illogical. *Collins* v. *Voorhees*, 47 N. J. Eq. 315 and 555. A therefore had no real matrimonial intent, or else it existed concurrently with the intent to deceive B. The former view seems more reasonable. There is authority for reaching the result of the principal case by applying the doctrine of estoppel. *In re Wells' Estate*, 123 N. Y. App. Div. 79; *Chamberlain* v. *Chamberlain*, 68 N. J. Eq. 414. A and his heirs, who are in privity with him, should be estopped to deny his consent, the estoppel becoming operative when he became capable of giving consent.

PROXIMATE CAUSE — EFFICIENT CAUSE OF INJURY — NERVOUS SHOCK FROM FRIGHT CAUSED BY NEGLIGENCE. — The plaintiff averred that the defendant's cow was being driven along a street by the defendant's servant, who set a dog on the cow, causing her to rush into a house, whereby the plaintiff, who was in the house, sustained a severe nervous shock, resulting in serious physical injury. The defendant demurred. *Held*, that the action lies. *Gilligan* v. *Robb*, 47 Sc. L. Rep. 733.

This case establishes in Scotland the right of recovery for physical hurt resulting from fright caused by negligence, where there is no impact on the person. For a discussion of the principles involved, see 7 HARV. L. REV. 304; 10 *id.* 239; 15 *id.* 304.

PUBLIC OFFICERS — ELIGIBILITY TO OFFICE — WOMAN ELECTED COUNTY TREASURER. — A woman was elected county treasurer. The state constitution limited suffrage to males, but had no provision as to eligibility for office on account of sex. *Held*, that she is entitled to the office. *State ex rel. Jordan* v. *Quible*, 86 Neb. 417. See NOTES, p. 139.

PUBLIC SERVICE COMPANIES — RIGHTS AND DUTIES — TELEPHONE CONNECTIONS WITH OTHER LINES. — The X Company operated a telephone line connecting cities A and B. The Y Company operated a telephone line connecting cities B, C, and D. These companies professed to make direct connections for the public between A and C. *Held*, that they had no public duty to afford the means of telephonic communication between A and D. *Albany Telephone Co.* v. *Terry*, 127 S. W. 567 (Tex., Ct. Civ. App.).

For a discussion of the principles involved, see 23 HARV. L. REV. 54.

QUASI-CONTRACTS — RIGHTS AND OBLIGATIONS OF PARTIES UNDER CONTRACTS — CONTRACT MADE UNENFORCEABLE BY A RULE OF EVIDENCE. — The plaintiff entered into an oral contract with H, whereby in return for services to be rendered he was to receive one-fourth of such profits as H might make in a sale of certain stock. The plaintiff performed the services, and brought suit on the express contract. H died, and the plaintiff thereupon became unable to testify in the case. He moved to amend the complaint so as to permit a recovery in *quantum meruit*. *Held*, that the motion must be denied,

since the plaintiff cannot recover in *quantum meruit*. *Donovan* v. *Harriman*, 124 N. Y. Supp. 194 (Sup. Ct., App. Div.).

The court in this case failed to distinguish between true contract and quasi-contract, the latter being imposed by law irrespective of the intent of the parties in order to effect an equitable result. See *Hertzog* v. *Hertzog*, 29 Pa. St. 465, 468. It is generally held that where services have been rendered under an oral contract within the Statute of Frauds, a recovery may be had therefor in quasi-contract to the extent of the reasonable value of the benefit conferred on the defendant, the obligation admittedly being imposed by law. *Day* v. *New York Central R. Co.*, 51 N. Y. 583. And the fact that the defendant's liability under the express contract is contingent is immaterial. *Cadman* v. *Markle*, 76 Mich. 448. This case is an analogous one, the express contract being unenforceable not because of any inherent fault but by a rule of evidence excluding the plaintiff's testimony. Hence an action of quasi-contract for the value of the services should be allowed, to prevent the unjust enrichment of the estate of the deceased at the plaintiff's expense.

RES JUDICATA — MATTERS CONCLUDED — ISSUES MATERIAL TO THE JUDGMENT. — A former suit between the parties was dismissed on the technical ground that the complaint bore a deficient court-fee stamp, and on the merits. *Held*, that the technical reason was sufficient for the determination of the case, and that the decision on the merits, being unnecessary, has not the force of *res judicata*. *Irawa* v. *Satyappa*, 12 Bombay L. Rep. 766 (Bombay, App. Civ. Ct., Aug. 4, 1910).

In a former suit between all of the essential parties to the present action, the court decided in favor of the plaintiff on a question raised by the pleadings and argued by counsel, but rendered judgment on another ground for the defendant. *Held*, that the decision on the former point, although unnecessary for the disposition of the case, is *res judicata*. *Green* v. *Edwards*, 77 Atl. 188 (R. I.).

When a judgment is based upon two distinct grounds, either of which is sufficient for the determination of the case, it cannot be said of either point that its determination was necessary to the decision. But if both points present issues material to the case, the doctrine of *res judicata* applies to both. *First Nat. Bank of Covington* v. *City of Covington*, 129 Fed. 792. The contrary holding of the first case is well matched by that of the second, which goes to the opposite extreme. Findings on immaterial questions, even though put in issue and directly decided, are, by the great weight of authority, not *res judicata*. *House* v. *Lockwood*, 137 N. Y. 259; *Hardy* v. *Mills*, 35 Wis. 141. Especially should this be the case where the decision on the collateral point is in favor of one party and final judgment is rendered for the other.

RIGHT OF PRIVACY — INFRINGEMENT OF RIGHT — WHAT CONSTITUTES INFRINGEMENT UNDER NEW YORK STATUTE. — A New York statute prohibits the use for advertising purposes or for the purposes of trade, of the name or picture of any person without his written consent. Without such authorization the defendant supplied various moving-picture exchanges with films containing the name and a pictorial representation of the plaintiff. *Held*, that the plaintiff is entitled to an injunction and damages. *Binns* v. *Vitagraph Co. of America*, 67 N. Y. Misc. 327 (Sup. Ct.).

The defendant newspaper, in connection with a biography of the plaintiff, published his picture without his written consent. Under the same statute, a motion for an injunction was made. *Held*, that the motion be denied. *Jeffries* v. *New York Evening Journal Publishing Co.*, 67 N. Y. Misc. 570 (Sup. Ct.).

For references to this statute and to discussions of the right to privacy, see 22 HARV. L. REV. 232.

RULE IN SHELLEY'S CASE — WHETHER APPLICABLE WHEN ANCESTOR'S ESTATE IS A VESTED REMAINDER. — A testator devised real estate to A for life, and at A's death to B. Should B predecease A, then the property was to go to B's heirs. B predeceased A. *Held*, that the heir of B takes by purchase under the will and not by descent, since the Rule in Shelley's Case cannot be applied where the ancestor takes a remainder and not an estate in possession. *Glendenning* v. *Dickinson*, 14 West. L. Rep. 419 (Brit. Columbia, Ct. App., June 1, 1910).

The only case found in point decides that the rule is applicable. *Wool* v. *Fleetwood*, 136 N. C. 460. And it is clear law that the rule applies when the ancestor's estate is a vested remainder which subsequently becomes the particular estate. *Spader* v. *Powers*, 56 Hun (N. Y.) 153; *Reutter* v. *McCall*, 192 Pa. St. 77; *Vangieson* v. *Henderson*, 150 Ill. 119. But nothing should turn on whether the remainder ever becomes an estate in possession, for if the rule operates upon the estate at all, it must operate when the estate vests in the ancestor, namely, the moment the instrument takes effect. See GRAY, RULE AGAINST PERPETUITIES, 2 ed., §§ 8, 9; CHALLIS, REAL PROP., 2 ed., 142. No such distinction can be deduced from the rule. *Shelley's Case*, 1 Coke 93 a, 104 a. The decision in the principal case seems to be based on the erroneous idea that the words "freehold" and "estate for life," occurring in the rule, mean only an estate in possession.

SCHOOLS AND SCHOOL DISTRICTS — READING BIBLE IN PUBLIC SCHOOLS. — In a public school, during school hours, the teacher conducted religious exercises, consisting of the reading of passages from the King James version of the Bible, reciting the Lord's Prayer as there found, and singing sacred hymns. The children of the relator, who was a Roman Catholic, were required to participate. The state constitution guarantees the free exercise and enjoyment of religious worship, and prohibits the appropriation of any public fund for any sectarian purpose. *Held*, that such exercises are unlawful. *People ex rel. Ring* v. *Board of Education of Dist. 24*, 92 N. E. 251 (Ill.).

It is generally agreed that religious exercises do not violate constitutional provisions guaranteeing freedom of worship, so long as the pupils need not be present or participate. *Billard* v. *Board of Education*, 69 Kan. 53; *Pfeiffer* v. *Board of Education*, 118 Mich. 560. *Contra*, *State ex rel. Weiss* v. *District Board, etc. of Edgerton*, 76 Wis. 177. Nor do such exercises make a public school a "place of worship." *Moore* v. *Monroe*, 64 Ia. 367; *Church* v. *Bullock*, 109 S. W. 115 (Tex.). The apparent conflict as to the meaning of "sectarian" is due largely to differences in the constitutional provisions wherein this word is used. The prevailing opinion is that reading from the King James version of the Bible does not make a public school a "sectarian school." *Stevenson* v. *Hanyon*, 7 Pa. Dist. 585; *Hackett* v. *Brooksville Graded School Dist.*, 120 Ky. 608. But the better view seems to be that this version is a "sectarian book," and that reading from it without comment or interpretation constitutes "sectarian instruction"; for the King James translation is the book adopted by the adherents of the Protestant faith as the basis of their beliefs, and reading therefrom without authoritative exposition is peculiar to that faith. *State ex rel. Weiss* v. *District Board, etc. of Edgerton, supra; State ex rel. Freeman* v. *Scheve*, 65 Neb. 853. *Contra, Hackett* v. *Brooksville Graded School Dist., supra.*

STATUTE OF FRAUDS — CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR. — The plaintiff, a dairyman, employed the defendant under a contract terminable by either on one week's notice, but subject to an oral agreement that, for three years after quitting or being discharged from such employment, the defendant should not sell milk within a radius of four miles from the plaintiff's route, nor solicit his customers. The action was to enjoin breaches of the

oral agreement. *Held*, that it is void within the Statute of Frauds. *Reeve* v. *Jennings*, [1910] 2 K. B. 522.

A contract of employment which in terms binds neither party definitely for more than one year need not be in writing, though the expectation be that it will extend over a longer period. *Carnig* v. *Carr*, 167 Mass. 544. Moreover, the weight of authority probably is that a contract is not within the statute, if it is intended that one of the parties complete his performance within a year. *Donellan* v. *Read*, 3 B. & Ad. 899; *Curtis* v. *Sage*, 35 Ill. 22; *Sauser* v. *Kearney*, 126 N. W. 322 (Ia.). There is considerable authority against this view, however, and on principle it is difficult to understand how an "agreement" may be "performed," within the language of the statute, by fulfilment on one side only. *Pierce* v. *Paine*, 28 Vt. 34; *Marcy* v. *Marcy*, 9 Allen (Mass.) 8. But in the principal case the three-year prohibition precludes performance by the defendant within one year, and justifies the inference that the parties expected that the plaintiff should employ him for a longer period. This intention and expectation of the parties is entitled to weight. *Roberts* v. *Tucker*, 3 Exch. 632; *White* v. *Fitts*, 102 Me. 240. Thus the case does not come within the exception stated, and the decision shows a wholesome disinclination to subject the statute to further encroachment by judicial interpretation.

Statute of Frauds — Contracts not to Be Performed Within a Year — Whether Provision Applies to Contracts for Sale of Goods. — The plaintiff and defendant entered into an oral contract for the sale of goods, not to be performed within a year. There was a part performance sufficient to take the case out of section 4 of the Sale of Goods Act, formerly section 17 of the Statute of Frauds. *Held*, that section 4 of the Statute of Frauds, relating to contracts not to be performed within a year, is applicable to contracts for the sale of goods. *Prested Miners Gas Indicating Electric Lamp Co.* v. *Garner*, [1910] 2 K. B. 776.

This point is definitely decided for the first time. In a few American cases it has been held that section 4 of the Statute of Frauds applies to contracts for the sale of goods, but it does not appear that the contention of the plaintiff in the principal case was made. *Saunders* v. *Kastenbine's Ex'r*, 45 Ky. 17; *Atwood's Adm'r* v. *Fox*, 30 Mo. 499. This view seems consistent with the general principles of statutory construction, which require that a statute be considered as a whole, and full effect given to every word not repugnant to the rest of the act. *United States* v. *Bassett*, Fed. Cas. No. 14,539. If general words are used, they are to be interpreted according to their logical and grammatical meaning. *Beckford* v. *Wade*, 17 Ves. Jr. 87; *Jones* v. *Jones*, 18 Me. 308.

Subrogation — Stranger Paying off Mortgage Under Mistake of Fact Subrogated to Rights of Mortgagee. — At A's request, and on A's promise to give him a new mortgage, B paid off an incumbrance. B supposed A owned the land, but in fact it was owned by A's wife. She knew nothing of the transaction, and refused to give B the new mortgage. *Held*, that a stranger who pays off a mortgage under a mistake of fact, even though not at the request of the mortgagor, may be subrogated to the rights of the mortgagee. *Butler* v. *Rice*, 103 L. T. Rep. 95 (Eng., Ch. D., May 25, 1910).

In certain cases where a stranger has satisfied the obligation of a debtor, equity, to prevent unjust enrichment, will revive the obligation and enforce it for his benefit. *Crippen* v. *Chappel*, 35 Kan. 495. But where an attempt has been made to extend this doctrine beyond payments to protect actual interests of the third party, or payments at the express request of the debtor, many courts have stumbled over the maxim that "equity does not protect a volunteer." Thus where a third party paid a mortgage, erroneously supposing himself to be the owner of the land, restitution was refused. *Wadsworth* v. *Blake*, 43 Minn.

509. So too where the request was from one whom he erroneously supposed to have authority. *Campbell* v. *Foster Home Association*, 163 Pa. St. 609. It is submitted, however, that if one acts under a *bonâ fide* belief in a state of fact or law which, if true, would justify the payment, he ought not to be regarded by equity as a mere officious intermeddler. No new burden is created, and the debtor ought not to be allowed to escape the old obligation at the expense of an innocent third party. This doctrine is upheld by an increasing body of authority. *Coudert* v. *Coudert*, 43 N. J. Eq. 407; *Capehart* v. *Mhoon*, 58 N. C. 178; *Crumlish's Adm'r* v. *Central Improvement Co.*, 38 W. Va. 390.

Trade-Marks and Trade-Names — Protection Apart from Statute — Situs of Property Right. — For many years the plaintiffs had been supplying the English trade, from their French distillery, with a liqueur which they called "Chartreuse." The French government confiscated their distillery and transferred the trade-name to the defendants, who thereupon invaded the English market with a pseudo-"Chartreuse." The plaintiffs continued to supply England from their new Spanish distillery, and sought to have the defendants enjoined from using the name. *Held*, that the defendants be enjoined. *Lecouturier* v. *Rey*, [1910] A. C. 262.

Both the American and the English rights to the trade-name "Chartreuse" are now determined, and the House of Lords and the Supreme Court of the United States have both determined them in the same way. For a discussion of the American case, see 21 Harv. L. Rev. 361, 373.

Trial — Verdicts — Correction of Record. — In an action for negligence against two co-defendants, the jury immediately upon retiring decided in favor of one defendant, and were discussing the liability of the other. When asked by an officer of the court whether they had agreed upon a verdict, the foreman replied in the negative. Thereupon the clerk of court by mistake entered a disagreement. A motion was made by the one defendant on the affidavits of all the jurors to correct the record, and enter a verdict for him. *Held*, that the motion should be granted. *Wirt* v. *Reid*, 138 N. Y. App. Div. 760.

The court in this case is trying to avoid a technicality of practice, and reach justice as between the parties. But a distinction must be drawn between agreeing upon a verdict, rendering a verdict, and recording a verdict. Where a correctly rendered verdict has been wrongly recorded, the minutes may be amended. *Tomes* v. *Redfield*, Fed. Cas. No. 14,085. Where by mistake the foreman announces in court a verdict different from that agreed upon by the jury, the error may be corrected. *Dalrymple* v. *Williams*, 63 N. Y. 361. In the principal case, however, no verdict was ever pronounced. As to one defendant the jury had reached a conclusion which they intended to give as a verdict, but they were not bound by that intention. At any time before that verdict was rendered in court, any juror was at liberty to change his mind. This mere intention, which did not bind even the jurors, the court records as a verdict binding upon the parties. As the jury was dismissed without giving any valid verdict, this was a mistrial. See *Fisk* v. *Henarie*, 32 Fed. 417, 427.

Unfair Competition — Means Unlawful as Against Third Persons — Measure of Damages. — The plaintiff's patent on drill chucks having expired, the defendant began to manufacture chucks of exactly the same size, style, and character, also duplicating the plaintiff's advertising cuts and printed matter. In a suit for an injunction the plaintiff prayed also for damages and an accounting of profits. Evidence was given as to the number of the defendant's sales but not as to his profits. *Held*, that in the absence of such evidence the profits that the plaintiff would have made on such sales determined the measure of damages. *Westcott Chuck Co.* v. *Oneida Nat. Chuck Co.*, 199 N. Y. 247.

Because of the close similarity between the two classes of cases, the rules governing actions for infringement of trademarks, although in great confusion, are applied to cases of unfair competition. *Fairbank Co.* v. *Windsor*, 118 Fed. 96. The English rule allows the plaintiff to elect between the damages he has sustained and the defendant's profits. *Lever* v. *Goodwin*, 36 Ch. D. 1. The early rule in this country gave the plaintiff such profits as he would have made. *Hostetter* v. *Vowinkle*, 1 Dill. (U. S.) 329. But later decisions give him the profits realized by the defendant. *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169. And in some cases damages are added. *Hennessey* v. *Wilmerding-Loewe Co.*, 103 Fed. 90. Other courts have given the difference between the plaintiff's cost-price and the defendant's selling-price. *Champlin* v. *Stoddard*, 34 Hun (N. Y.) 109. The rule adopted in the principal case seems just. The defendant has diverted certain of the plaintiff's potential sales, which should be credited to the plaintiff *in toto*, since no equitable method of division is possible. And the plaintiff should recover what he would have made on such sales, rather than what the defendant has made; for he should neither profit by the defendant's economies of production nor suffer for the defendant's disadvantages.

BOOK REVIEWS.

THE LAWS OF ENGLAND. By the Right Honorable the Earl of Halsbury and other lawyers. London: Butterworth and Company; Philadelphia: Cromarty Law Book Company.

Vol. V. Companies. pp. ccvi, 769, 50.
Vol. XI. Descent to Ecclesiastical Law. pp. clxxix, 829, 81.
Vol. XII. Education to Electric Lighting and Power. pp. cxxii, 648, 48.

Volume V is devoted entirely to company law, and forms a treatise of seven hundred and sixty-eight pages on that subject. After a general consideration of the nature and domicile of companies, the work considers briefly the history of company legislation; then follows an elaborate treatise on the Companies Act of 1908. Special companies, like banking, insurance, and public-service companies, are considered; as well as chartered companies, the livery companies of the city of London, quasi-corporations, and illegal companies; and a few pages are devoted to foreign companies. The table of cases cited must contain at least five thousand cases. The importance of this treatise is at once apparent; and to the commercial lawyer in our Eastern cities it will be exceedingly useful.

Volume XI contains a short article on Descent and Distribution; a discussion of Discovery, Inspection, and Interrogatories, under the English practice; an elaborate article on Distress; an article on Easements and Profits, which is the most interesting in the volume to an American lawyer; and an elaborate disquisition on Ecclesiastical law.

In Volume XII the articles on Education and Elections have comparatively little value for our bar; but the hundred pages devoted to Electric Lighting and Power are useful.

The quality of these articles seems to be maintained at a high level, and the work should be in every law library, public or private, which aims to contain more than the mere necessary tools of trade. J. H. B.

DAY IN COURT. By Francis L. Wellman. New York: The Macmillan Company. 1910. pp. 257.

In his prefatory note Mr. Wellman says of the Day in Court: "This is in no sense a law book. . . . The purpose of this book, therefore, is to give to the

general reader, and young men who desire to become successful advocates, some practical knowledge of the arts of great advocates in eliciting truth . . . Originally written without any idea of publication, these pages fall far short of being a scientific treatment of the subject and perhaps fortunately so, for otherwise they might be occasionally consulted but seldom read." That such is the purpose of this book is important for two reasons. First, the reader should not expect to find a scientific analysis of the complicated relation of the advocate who may ask questions and argue, to the witnesses who must answer, and to the court and jury who must judge. The purpose of the book is to teach by written experience, not by theory. Second, the general reader must not suppose that the career of the business or office lawyer is slighted. Such a career is simply outside the subject in hand. The book should be considered in its special field. The opening chapters concern the qualities of mind and body which a man should have to be fitted for the career of an advocate. These qualities are arranged clearly under the heads of physical endowments, mental endowments, and educational qualifications. Those qualities that are essential are distinguished from those that are merely desirable. The argument is pointed by illustrations from the careers of great advocates. Whether or not the young man will always quite agree with the author is not important; it is important that he will surely think about the subject. The later chapters of the book describe step by step the events in a case as it would be handled by a practitioner in New York, — the preparation, the selection of a jury, the opening, the direct and cross-examination, the handling of documents, and the summing-up. The fact that the scene is laid in New York hardly affects the general value of the description. The many details of the trial are not merely described so that the reader is made aware of the numerous advantages to be gained by special attention to separate points, but each detail is illustrated by specific instances, successful and unsuccessful, which serve to fix it in the memory. These same specific instances add a human quality to the book which not only makes it interesting to the prospective lawyer but also makes it a very readable volume for the general public. P. K.

CONSULAR CASES AND OPINIONS. By Ellery C. Stowell. Washington: John Byrne and Company. 1909. pp. xxxvi, 811.

The duties of consuls are, in these days of expanding international trade and intercourse, of growing importance. A book such as Mr. Stowell has prepared is timely and useful. It has been demonstrated that not only law, but history and many other branches of human knowledge, may be taught and learned most effectively by the case system, when the cases are selected with knowledge and discrimination. So that, for use both by teachers in schools and colleges, and by the consuls themselves at their posts, a book such as this possesses value.

About three hundred and twenty-five cases in English and American courts are included in the collection; and some sixty-five opinions of Attorneys-General of the United States, from Bradford to Knox. Of the cases only brief extracts are given in most instances; and of some a summary by the editor is printed instead of extracts. To the opinions of the Attorneys-General (most of which are printed in full) headnotes have been added.

The indices with which the book is plentifully supplied are full, and well made. Everything has been done to make the matter in the book readily available. There is an alphabetical list of the cases, a chronological list, and a list arranged under the names of the judges who decided the cases. The Opinions of the Attorneys-General are indexed under the names of the Attorneys-General, arranged alphabetically. In addition to the foregoing, the book

contains also "Regulations relating to the Immunities of Consuls"; "An Analysis of Treaties of the United States relating to Consuls"; "An Index Analysis of Federal Statutes" relating thereto; an extract from the "Consolidated Index to the United States Statutes at Large"; and a "Compendium," or syllabus of the law. There is also the general index. The practical advantages of the book are that it not only contains much information in convenient form for immediate use by consuls; but it also enables them, by means of the indices, to get at once to all other sources of the law governing their rights, duties, and obligations. S. H. E. F.

RACE DISTINCTIONS IN AMERICAN LAW. By Gilbert Thomas Stephenson. New York: D. Appleton and Company. 1910. pp. x, 362.

This book expressly disclaims the status of a legal treatise, and the publishers have spared no pains to give it an unlegal aspect. Yet it is not for the general reader. It is in truth a statistical compendium of all *post bellum* statutes and common-law doctrines in which race distinctions are enunciated; and of these all but a very few deal with the negro. To the future historian of the period the book will be a staff of comfort. But for those who feel with the Autocrat that facts are the brute beasts of the intellectual domain, its interest will lie chiefly in the chapters on Separation in the Schools, the Negro in Court, the Preface, wherein the author admirably defines the difference between race distinction and race discrimination, and the final chapter, which sets forth the conclusions drawn from the patiently collected data. Some of these conclusions are rather disappointingly mild; as, for instance, that race distinctions are not confined to one section or to one race. But there is much food for thought in the author's belief that race distinctions are not decreasing, are not based upon race superiority, and that the solution of the race problem is hindered by the multiplicity of proposed remedies. In this connection, however, he notes a growing tendency toward a general and united effort to settle permanently all racial antagonisms; and toward this movement he contributes the conviction in which long study has confirmed him: "The welfare of both races — and this conclusion applies equally to the other non-Caucasian races — requires the recognition of race distinctions and the obliteration of race discriminations." L. J. P.

HISTORY OF RECONSTRUCTION IN LOUISIANA THROUGH 1868. By John Rose Ficklen. Baltimore: Johns Hopkins Press. 1910. pp. ix, 230.

Professor Ficklen was eminently qualified to write on the period of reconstruction in Louisiana. Going to the state at the close of the period, and thus escaping the bias natural to a participant in the events he was to narrate, he lived until 1907 among the actors in the drama. His daily conversation must have turned on the great political convulsion which was uppermost in the minds of his neighbors, so that his knowledge of events was almost as intimate as if he himself had lived through them, and of a sort that cannot be had from mere written records. He became professor of history in Tulane University in 1893, and for more than a decade the labor nearest his heart was preparation for this his master work. His untimely death in 1907 left his work incomplete, the present volume reaching only to 1868, and for the years preceding that date he was unable to bring his manuscript to final completion. His colleague, Professor Butler, with the aid of Professor Andrews of Johns Hopkins, edited the work, and saw it through the press.

The editors divided the book into eleven chapters, heading them, Ante-Bellum History in Louisiana; Butler's Administration; Reconstruction under the Presidential Plan; The Convention of 1864; Government during the War;

Reconstruction in Louisiana under President Johnson; The So-called Riots of July 30, 1866; The Reconstruction Acts, 1866–1867; Restoration of Louisiana to the Union; Party Organization; Massacre of 1868 and the Presidential Elections.

That "Reconstruction of the congressional type was a gigantic blunder — if not a political crime" (p. 7), most students of the epoch will agree, and the author in discussing it does not wish to and does not "produce a colorless narrative." Both his scholarship and his sympathy with his neighbors is manifest in every judgment. He sees plainly that the parties to the events were so blinded by ignorance of real conditions or by passionate determination to follow their own lights, that any sort of intelligent adjustment of the distressing conditions immediately succeeding the war were practically impossible. He disagrees with those who think that had Lincoln lived (p. 98) "he would have been able, by virtue of his sound judgment and immense popularity, to carry out" his original plan of reconstruction. While acknowledging all the great tact and charity of the martyred President, the author asks, "Is it likely . . . that he could have prevented the Southern States at the close of the war from exasperating the feelings of the Republican [would not the word "Radical" be more accurate here?] majority in Congress by unwise vagrant laws, and by premature attempts to restore 'rebels' to a participation in state and federal legislation? Or could he have persuaded this Congress to relinquish its determination to deny the suffrage to the 'rebel' for his punishment, and to grant it to the freedman for his protection and for the perpetuation of party supremacy? Such influence would probably have been beyond the power even of Lincoln's greatness." No one but weak human nature can be blamed for the fact that hatred and uncharity are the results of war, which if it is hell while it exists, is even worse, if possible, in its aftermath.

It is a sad chapter in our history that tells how impossible it was for large numbers of the well-meaning people of the North to understand the position in which the Southerner stood, and the almost impossible problems of labor and life that confronted him and the irresponsible barbarians that had just been made fiat-citizens. The negroes of the South, pathetically discussed on pages 126–128 and *passim*, and their former masters understood each other so well that the so-called riots and massacres of 1866 and 1868 would never have been heard of had the plain citizens of the sections been able to meet and talk the matter over. But blank ignorance and prejudice have always been the tools of the demagogue, and these tools have never in history been more unsparingly used than in Louisiana from the advent of General Butler in 1862 until the final withdrawal of the federal troops from the state at the end of the era.

Professor Ficklen's book is provided with an index and ample footnotes, citing his authorities, which latter consist not only of newspapers, public documents, and other customary sources of information, but also in large measure of conversations in which the persons are cited by name. The future student of the period will find this an indispensable addition to his library. E. D.

QUESTIONED DOCUMENTS. By Albert S. Osborn. Rochester: Lawyers Co-operative Publishing Company. 1910. pp. xxiv, 501.

THE INTIMATE LIFE OF ALEXANDER HAMILTON. By Allan McLane Hamilton. Cambridge: Harvard Coöperative Society; New York: Charles Scribner's Sons. 1910. pp. xii, 483.

CONTRACTS IN ENGINEERING. By James Irwin Tucker. New York: McGraw-Hill Book Company. 1910. pp. xii, 307.

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THE DOCTRINE OF CONTINUOUS VOYAGE.

LAW as it develops strives to deal with facts as they are and not with the mask with which they are disguised. According as it is more or less successful in so dealing with the realities instead of the pretenses, the administration of law avoids the reproach of artificiality and inefficiency.

The doctrine of "continuous voyage" is one of the most marked examples of this tendency as developed in public law. Certain trades were confined to the vessels belonging to a nation, as its coasting and its colonial trade. When a state of war made it impossible or inconvenient to carry on this trade in vessels of the belligerent nation, because they were subject to capture and condemnation, that belligerent opened such trade to neutrals and the neutral ships claimed immunity. This situation was met by the holding of the courts of Great Britain that such neutrals, so employed, were engaged in the commerce of the enemy, thereby acquired enemy's character and were accordingly subject to condemnation. To avoid this result these neutral ships adopted the device of visiting a neutral port between the two enemies' ports which were the real beginning and end of the voyage. They broke the voyage and claimed that it was not from one belligerent port to another, but from a belligerent port to a neutral and from that neutral port to the final belligerent destination. The ship was therefore always on a voyage between a belligerent and neutral port. This was met by the English holding that the voyage was continuous notwithstanding such stop, and was in fact, and there-

fore in law, a voyage from one hostile port to another; and condemnation was pronounced accordingly. Sir W. Scott held strongly that there could be no contraband goods bound for a neutral port,[1] but the question of an ulterior hostile destination seems not to have been there presented. Mr. De Hart[2] says that this question never arose in those earlier wars, and attributes this to the difficulties of land carriage in that age.[3]

Then the device was adopted of not merely calling at, but temporarily unloading and paying duties in, the neutral port and later reloading and continuing the voyage. The practice was so extensive that more than one third of the colonial produce imported into the United States seems to have been reëxported, making use of drawbacks for duties paid.[4] Lord Stowell had at first thought that this device was sufficient,[5] but the rule of the English courts was ultimately settled otherwise. In The William,[6] in an extended opinion by Sir William Grant, it was in 1806 finally decided, so far as English law is concerned, that a cargo shipped from a hostile port to a neutral port, then unloaded with payment of duties but shortly reloaded, and, as part of the original design, shipped to a hostile port, is in one continuous voyage throughout; and since both *termini* are hostile, the fact that it is in a neutral ship will not save it from condemnation. The importation into the neutral country was held a fictitious importation and a mere voluntary ceremony.[7]

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[1] The Immina, 3 C. Robinson, 167. [2] 17 Law Quarterly, 193.

[3] See The Maria, 5 C. Robinson, 365; Wheaton's International Law, 4 Eng. ed., sec. 508*a*, and many cases there cited.

[4] See a note in 5 C. Robinson, 365, quoting "a late popular publication in America under the signature Phocion," to the effect that the value of Colonial produce reexported by means of drawbacks from America to Europe was by official reports in the last year $28,000,000, being more than one-third, namely, twenty-eight seventy-fifths, of the whole imports of the country.

[5] The Polly, 2 C. Robinson, 369. [6] 5 C. Robinson, 385.

[7] As to taking part in the coasting trade of the enemy, see The Welvaart, 1 C. Robinson, 122 (1799) (opinion by Sir W. Scott); The Johanna Tholen, 6 C. Robinson, 73; The Ebenezer, 6 C. Robinson, 250.

As to the Colonial trade, see The Immanuel, 2 C. Robinson, 186 (1799) (opinion by Sir W. Scott) ; The Maria, 5 C. Robinson, 365 (1805) (opinion by Sir W. Scott); The Phœnix, 3 C. Robinson, 186 (1800) (opinion by Sir W. Scott).

See 4 C. Robinson, appendix; The Juliana, 4 C. Robinson, 328; The Jonge Pieter, 4 C. Robinson, 79; The William, 5 C. Robinson, 385, and also table of cases, 3 Phillimore, 385.

The notes to 4 Eng. ed. of Wheaton, sec. 508*a*, maintain that "in Lord Stowell's

Except by treaties, the law of war is developed only in time of war or in adjudications arising from incidents of the struggle. After the great Napoleonic wars, as a result partly of exhaustion, partly of adjustments, there ensued a long period of comparative peace in Europe. No great war involving naval operations can be mentioned until the Crimean War. In that war control of the sea was so wholly with the allies that it cannot be called a naval war, but it affords one well-known case involving the doctrine of continuous voyage. That doctrine had not been favored by the continental countries of Europe, but had been much condemned. However, the Hanoverian ship, Frou Howina, with a cargo of saltpeter, bound for a neutral port but with an ultimate destination of the cargo for Russia, was brought in and the cargo condemned by the *Conseil Général des Prises* of France in 1855.[8] This seems the first extension of the rule to the transport of contraband of war, and the extension must be attributed to the courts of France.[9]

There seems no further extension of the scope of the continuous-voyage doctrine until the case of The Dolphin, during the War of the Rebellion.[10] This was the case of a steamer of apparently British ownership, captured between the Islands of Culebra and Porto Rico, March 25, 1863, and brought in by the U. S. S. Wachusetts. There were found on board nine hundred and twenty rifles and two thousand two hundred and forty cavalry swords, described as hardware, and consigned by Grazebrook of Liverpool to parties in Nassau. In the United States District Court for the Southern District of Florida it was shown that a secret letter from Grazebrook to the master was found on board which could only be

time and down to the American Civil War this doctrine had only been applied to cases covered by the above doctrine, often called 'the Rule of 1756,' or where an underhand trade was attempted to be carried on by subjects of one belligerent with the enemy." (See as to the Rule of 1756, 3 Phillimore, 371; and Kennedy, L. J., International Law Assoc. Rep. [1908] 41.) However, in the notes to sec. 501*e* to the same edition of Wheaton, a French case hereafter mentioned is considered and set out in a way, it seems, not wholly consistent with the above.

[8] See Westlake, International Law, Part II, 257; Calvo, Droit Intern., Tome 5, 52; Wheaton, International Law, sec. 501*c*, note *d*.

[9] See Mr. De Hart, 17 Law Quarterly Rev. 194–195, 199; Wheaton, International Law, 4 Eng. ed., sec. 501*c*, notes; 2 Westlake, International Law, 257; 2 Oppenheim, International Law, sec. 401. Messrs. Smith & Sibley (Intern. Law, Russo-Japanese War, 235, 241–242) contend that the doctrine of continuous voyage was extended to contraband in the case of The Eagle, Adm. 1803. See also the article by Mr. Lester H. Woolsey, Amer. Jour. Intern. L., Oct., 1910, p. 823.

[10] See 7 Moore, Dig. International Law, 700; 7 Fed. Cas. 868.

understood as intending that the cargo be transported to some Confederate port; and they were all blockaded. Marvin, J., held that Nassau furnished no market for such a cargo, that Grazebrook did not intend that her voyage should end at Nassau, and that all facts pointed with unerring certainty to Charleston or Wilmington as the ulterior destination of the vessel and cargo, and that the purpose was to violate the blockade. Both ship and cargo were condemned and there was no appeal.[11] It will be observed that an important part at least of the cargo was contraband and that the ultimate destination was a blockaded port, but the penalty was that appropriate for breach of blockade, namely, condemnation of both ship and cargo.

In the same month the same court decided the case of The Pearl, captured on a like voyage from Liverpool to Nassau. The cargo consisted of bales of cloth and ready-made clothing. There being no evidence to satisfy the court of a belligerent destination, restitution of vessel and cargo was decreed by the lower court, but this was reversed by the Supreme Court and the ship and cargo condemned, the latter court being satisfied that they were destined for one of the blockaded ports.[12] The penalty was that due to breach of blockade and no contraband goods appear involved. The lower court cited and relied on the English decisions for its conclusions. The Supreme Court cited no authorities and merely discussed the evidence.

In July of the same year Judge Betts of the United States District Court for the Southern District of New York decided the case of The Stephen Hart,[13] captured twenty-five miles from Key West with a cargo of ammunition and military clothing apparently bound for Cardenas, Cuba, where she was to be subject to the orders of one Helm, agent of the Confederate States in Cuba. There was direct evidence that the cargo was probably to be transhipped at Cardenas into a vessel more suitable for blockade running, unless the "Hart" were ordered to attempt the blockade herself, and that the goods were bought and designed for the enemy. Judge Betts held that the issue was

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[11] See The Dolphin, 7 Fed. Cas. 868.

[12] See The Pearl, 19 Fed. Cas. 54, 5 Wall. (U. S.) 574, and 7 Moore, Dig. International Law, 702.

[13] Blatchford, Prize Cases, 387.

"whether the adventure of the 'Stephen Hart' was the honest voyage of a neutral vessel from one neutral port to another neutral port, carrying neutral goods between those two ports only, or was a simulated voyage, the cargo being contraband of war and being really destined for the use of the enemy and to be introduced into the enemy's country by a breach of blockade by the 'Stephen Hart' or by transhipment from her to another vessel at Cardenas."

It was held that calling at a neutral port or transhipment therein made no difference if there were intent to transport contraband to the enemy, and that in transport of contraband if any part of the voyage be unlawful it is unlawful throughout. "The law seeks the truth," he says, "and never in any of its branches tolerates any such fiction as that under which it is sought to shield the vessel and her cargo in the present case."

Judge Betts quoted Sir Roundell Palmer, then Solicitor-General of England, as having stated in the House of Commons that the principles of the judgment in the case of The Dolphin "were to be found in every volume of Lord Stowell's decisions."

He also quotes a letter from the Foreign Office of Great Britain of April 3, 1863, to the owner of the "Peterhoff," after having communicated with the law officers of the Crown, to the effect that the United States had no right to seize a British vessel *bonâ fide* bound from a British port to another neutral port unless such vessel attempts to touch at, or has an intermediate or contingent destination to, some blockaded port or place, or is a carrier "of contraband of war destined for the enemy of the United States." There was a decree condemning both vessel and cargo and a like decree on the same day in the similar cases of The Springbok and The Peterhoff. The decree was affirmed by the Supreme Court in The Hart.[14] Judge Betts's opinion in the above case is always considered the strongest and best statement of the American doctrine.

The first case upon the topic to be decided by the Supreme Court of the United States was The Bermuda,[15] the case of an alleged British ship, captured seven miles from shore. There was slight evidence that her immediate destination was a blockaded port. She was about one hundred and sixty miles from Florida, in the hands of those engaged in blockade running and under instructions

[14] 3 Wall. (U. S.) 559.

[15] 3 Wall. (U. S.) 514 (1865).

from the English agent of the Confederacy, laden with military and government supplies, some marked with the initials of the Confederate Government, and accompanied by many letters and messages for Charleston. The ship and munitions of war were condemned below. The court agreed that neutral trade from one neutral port to another was entitled to protection if that which is conveyed is (in the words of Sir W. Scott) to become a part of the common stock of the neutral port; but that if the cargo is intended in reality to be sent by the same ship or another to a belligerent port, the rule is otherwise. The case of Jecker *v.* Montgomery [16] was cited, wherein in 1855 a shipment to a Mexican port while the United States was at war with Mexico was held to subject ship and cargo to condemnation for trading with the enemy, and that the interposition of a neutral port through which the property is to pass does not prevent it from being condemned. The court observed that at first Sir W. Scott [17] held that the landing and warehousing and the payment of the duties on importations was a sufficient test of termination of the original voyage, and that a subsequent exportation of the goods to a belligerent port was lawful; but in a later case, in an elaborate judgment, Sir William Grant [18] reviewed all the cases and established the rule, which has never been shaken, that even the landing of goods and payment of duties does not interrupt the continuity of the voyage of the cargo. "There seems no reason why this reasonable and settled doctrine should not be applied to each ship where several are engaged successively in one transaction, namely, the conveyance of a contraband cargo to a belligerent." It held, furthermore, that if the shipowner does not know of the ulterior hostile destination of the cargo the ship is not liable, otherwise if he knows. "Successive voyages connected by a common plan form a plural unit." Thus "a neutral ship conveying contraband to a belligerent port under circumstances of fraud and bad faith is subject to condemnation, and in this case the cargo all consigned to enemies and most of it contraband must share the fate of the ship." Also the court found that the original or ultimate destination was a blockaded port, and that the voyage from Liverpool to a blockaded port was one voyage.

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[16] 18 How. (U. S.) 114.

[17] The Polly, 2 Robinson, 369, fully justifies this.

[18] The William, 5 C. Robinson, 385, *supra*.

Accordingly, by starting with such proposition in view, the liability to condemnation for attempted breach was fastened on the ship as firmly as if she had designed to carry it to the blockaded port herself, or to carry it as near as possible, and then to have it sent by a steamer of light draft or greater speed. The decree of condemnation of the vessel and of the whole cargo was affirmed.

In The Peterhoff [19] there was a decree below condemning the ship and her cargo of contraband bound for Matamoras, a Mexican port on the Mexican side of the Rio Grande River opposite the Confederate port of Brownsville. The cargo consisted in part of military supplies designed for the Confederate government. This decree of condemnation was reversed as to the ship and affirmed as to a part of the cargo. The mouth of the river was held not to be blockaded; and trade to Matamoras, even with intent to transport the goods thence to the enemy, otherwise than by sea, was not subject to forfeiture, but goods contraband of war and other goods of the same owner were condemned.

The English Court of Common Pleas in a case arising upon a policy of insurance on the cargo of the "Peterhoff" in 1864 [20] reached the conclusion [I quote the syllabus]

"that goods that are contraband of war in the course of transport from a neutral port to a neutral port in a neutral ship are not, by the law of nations, liable to seizure by the cruiser of a belligerent state, even though the shipper may know or intend that they shall ultimately reach a port belonging to the enemies of the captors. To render goods contraband of war liable to seizure they must be taken *in delicto*, that is, in the actual prosecution of a voyage to an enemy's port."

The matter was not further contested. However, in Seymour *v.* London & P. M. Insurance Co.[21] the same court later held distinctly that the warranty as to other goods on the same ship had been broken when the intention was that the goods should go into the Confederate states in the course of the same transaction, and Mr. E. L. De Hart [22] very ably maintains that these English decisions in no way establish a doctrine adverse to that of continuous voyage in matter of contraband.

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[19] 5 Wall. (U. S.) 28.

[20] Hobbs *v.* Henning, 17 C. B. N. S. 791.

[21] 41 L. J. C. P. 193.

[22] 17 Law Quarterly, 193; 23 Law Quarterly, 197. See also 2 Westlake, International Law, 256.

In The Springbok [23] the decree was reversed as to the ship, affirmed as to the cargo, on the ground that there was the intent to run a blockade. The owner of the ship and the master appear not to have known the character of the goods. The cargo being intended merely for transhipment at Nassau, into some other vessel more likely to succeed in breaking blockade, the voyage from London to the blockaded port was held as to the cargo, both in law and in the intent of the parties, to be one voyage, and the liability to condemnation if captured during any part of that voyage attached to the cargo from the time of sailing.

This case is of interest as treating the cargo as guilty of breach of blockade, when intended for entry into a blockaded port, even though the ship, which formed one of the connecting links, was wholly innocent of the design and subject to no penalty. It fully applies the penalties of breach of blockade to a *guilty cargo* in an *innocent ship*, and is directly opposed to the perhaps general doctrine of writers (a doctrine which I submit is less known to courts) that the offense of breach of blockade "is essentially one of the ship and not an offense of the goods, except as derived from that of the ship." [24]

I venture to suggest, with deference, that the object of the rules as to breach of blockade is primarily to prevent cargoes entering or leaving the invested port, and that instead of the cargo being an incident and the ship the principal concern, it is exactly the opposite. The vehicle is forbidden merely to hinder her freight. Therefore the American rule may be justified, as in the above case. Now that aerial navigation is achieved, an added intricacy of connecting carriers may be expected, and any relaxation of the rule will still further endanger the efficiency of blockading operations. The law ought to penalize the thing carried quite as much as the carrier. I submit that the Japanese regulations during her late war are in accord with this view, as I shall presently seek to show.

In February, 1864, Earl Russell instructed Lord Lyons, the British Minister at Washington, as to The Springbok, that Her Majesty's Government "could not officially interfere," and as to that case "a careful perusal of the able judgment in the cases of

[23] 5 Wall. (U. S.) 1.

[24] See Westlake, International Law, Part II, War, 257.

the 'Stephen Hart' and 'The Gertrude,' in which the same parties were involved, goes so far to establish that the cargo of the 'Springbok' was never *bonâ fide* destined for Nassau, that the complicity of the owners of the ship with the design of the owners of the cargo is, to say the least, so probable, on the evidence, that there would be great difficulty in contending that the ship and cargo had not been rightly condemned."

Earl Russell's communication referred to the proofs that the cargo "containing considerable portion of contraband was never really *bonâ fide* destined for Nassau, but was either destined merely to call there or to be immediately transhipped after its arrival there without breaking bulk, and without any previous incorporation into the common stock of that Colony and then to proceed to its real destination, being a blockaded port."

On application to the Foreign Secretary, Lord Stanley, and on the joint opinion of Messrs. George Mellish, K. C., and W. Vernon Harcourt, K. C., that the sentence was erroneous, the matter was referred to the law officers of the Crown; and the Foreign Office, July 24, 1868, announced that Her Majesty's Government would not be justified on the materials before them in "making any claim" for compensation. Again, the inference is held warranted that the goods were intended for immediate transhipment and importation into a blockaded port.

In April, 1864, Earl Russell, on advice of the law officers of the Crown, declined to intervene on the part of Her Majesty's Government as to the decisions in the cases of The Peterhoff and The Dolphin, and was not prepared to say they are not in harmony with English prize cases, and he also held the case of The Pearl fair and equitable.[25]

Before the International Commission, under the Treaty of Washington, all claims on account of the cargo of the "Springbok" were unanimously disallowed, and all claims on account of the "Peterhoff," the "Dolphin," and the "Pearl" were in like manner disallowed.[26] No claim was made in case of the "Bermuda."

This "Springbok" decision has been attacked generally by the most respectable writers on international law, both English and Continental, and condemned by the Maritime Prize Commission,

[25] See 7 Moore, Dig. International Law, 723.

[26] 7 Moore, Dig. International Law, 725–726.

nominated by the institute of International Law,[27] and it has been argued that it lacked logical precision in indicating how far it involved a question of blockade.

Mr. Fish, Secretary of State of the United States, in 1871, stated that one hundred and sixty-seven cases had been condemned by the United States Prize Courts and that "with the exception of one case, that of the 'Springbok,' the Department of State is not aware of a disposition on the part of the British Government to dissent from any final adjudication of the Supreme Court of the United States in a prize case.[28]

The case of the Dutch ship 'Doelwyk,' captured by an Italian cruiser in the Red Sea in 1896 about ten miles from the French port of Djibouti, during the war between Italy and Abyssinia, is the next decision in point. The cargo was mainly arms and munitions of war. The immediate destination was a neutral port closely connected with belligerent territory. The Italian Prize Court condemned both ship and contraband cargo, but the conclusion of peace prevented the decree for condemnation from being carried out.[29]

As has been observed, "the second state of transportation from the neutral port to the enemy in the case of the 'Springbok' was from a neutral port to the enemy by water, and in the case of the 'Doelwyk' by land. Both cases sustain the doctrine of continuous voyage. Both decisions have received much criticism." [30]

A committee of the Institute of International Law, including many of the most eminent English and Continental scholars, in the same year, 1896, reported in favor of the rule as to continuous voyage applying to contraband, and this was confirmed by the vote of the Institute.[31]

The British Admiralty Manual of Naval Prize Law,[32] issued by authority of the Lords Commissioners of the Admiralty of Great

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[27] 7 Moore, Dig. International Law, 731.

[28] Gessner's Review of The Springbok, cited 7 Moore, Dig. International Law, 733.

[29] International Law Topics and Discussion, Naval War College (1905), 100–101; 2 Westlake, International Law, 28; 2 Oppenheim, International Law, 440; Smith and Sibley, International Law, Russo-Japanese War, 245.

[30] International Law Topics, Naval War College (1905), 100–101, *supra*.

[31] See Annuaire de l'Institut de Droit International, (1896), 231; Topics and Discussion, *supra* (1905), 103.

[32] Holland's ed. (1888) sec. 73.

Britain, provided that if the destination of the vessel be neutral "the goods on board should be considered neutral, notwithstanding it may appear otherwise that the goods themselves have an ulterior hostile destination to be attained by transhipment, overland conveyance, or otherwise."

In 1899, however, Great Britain, being at war with the South African Republic, an inland nation, and Lorenço Marquez, a Portuguese harbor, being the port through which supplies could be most easily got by the Republic, Great Britain maintained the right to visit, search, and seize neutral vessels, and did seize three German ships on suspicion of carrying contraband. In reply to the protest of the German government on the ground that there could be no contraband in goods bound to a neutral port under the general principles of international law, supported by the British Admiralty Manual as above, Lord Salisbury for the Government held that the provision of the Manual was not applicable, and quoted Bluntschli for the doctrine that if the ships or merchandise were bound for a neutral port, but to go beyond in aid of the enemy, confiscation would be justified. No contraband was found, however, on the three ships seized. Mr. Atlay believes the doctrine of Lord Salisbury will be apt to prevail in future.[33] Mr. Atlay in his notes to Wheaton[34] thinks that so far as contraband is concerned "the British Government is inclined to accept the principles followed by the courts of the United States," and he calls attention to the well-known fact that the British Government, at the time the decisions by the United States courts were complained of, "distinctly refused to make any diplomatic protest or enter objection against the decision of the United States Prize Court."

Notwithstanding the celebrated declaration of Sir Henry Maine, made in 1887, as to the greatly diminished importance of the blockade owing to improved transportation by land, and that South America would be "the only part of the world . . . at which blockades would be of value,"[35] they have since proved important operations in at least two other regions, — the coast of Cuba and the Pacific coast of the Russian possessions.

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[33] Atlay's note to Hall's International Law, 5 ed., 671, quoted in International Law Topics and Discussion (1905), 97.

[34] 4 Eng. ed. 687.

[35] International Law, 116.

The Japanese regulation of March, 1904, as to maritime capture provides:

"ART. 17. In the case of a ship, the destination of which is not the enemy's territory, whether she calls at that destination and discharges cargo or not, if there is reason to believe that the cargo in question is being conveyed to the enemy's territory, her voyage shall be regarded as a continuous voyage, and her destination shall be held to have been, from the commencement, the enemy's territory." [36]

This seems to commit Japan, whose naval operations in war are most recent, enlightened, and important, to the doctrine of continuous voyage, and the language is broad enough to apply to a cargo ultimately bound to an enemy's port, even when the ship was not so bound, and to call logically for condemnation of the cargo if contraband, and of cargo and ship if the ultimate destination of the cargo is a blockaded port; since in such case the language of the regulation makes the ship's destination from the beginning "the enemy territory" notwithstanding a "discharge" in a neutral port. The final destination of the cargo infects the ship. If such final enemy destination is a blockaded port, the voyage being regarded as continuous, forfeiture must follow. During the blockade or siege of Port Arthur, the most recent known, twenty-three vessels were captured attempting to break blockade.[37]

The writer has examined the adjudicated cases arising in the Prize Courts of Japan as reported in Professor Takahashi's valuable work on "International Law applied to the Russo-Japanese War," and has not found any decision in point.

In the discussion at the United States Naval College in 1905,[38] the conclusion was reached that the just regulation upon this question would be that "the actual destination of vessels or goods will determine their treatment on the sea outside of neutral jurisdiction."

As law advances it deals more and more with actualities and less and less with forms or pretended facts.

It seems as if every naval power, having command of the sea, had found itself constrained in practice to adopt, as far as convenient, the continuous-voyage doctrine even against its own official

[36] Naval War College, International Law Topics and Discussions (1905), 103; Takahashi, International Law applied to the Russo-Japanese War, 780.

[37] Smith and Sibley, International Law, Russo-Japanese War, 323.

[38] International Law Topics and Discussions, 106.

or academic declarations, whenever an actual case presented itself, and this in the face of almost universal criticism. There is then a vitality in the rule which intimates that it is stronger, at least, than academic opinion, and it does not seem discredited even in its extreme results by judicial decision or positive governmental action.

The International Naval Conference of London, 1909, agreed to articles which, if they become law, greatly modify the rule on the subject.[39] These articles provide:

"Article 7. Neutral vessels may not be captured for breach of blockade, except within the area of operations of the warship detailed to render the blockade effective."

This, however, is no petty space. The breach of blockade being now almost wholly a night operation, and the time of capture of vessels guilty of egress being apt to be the dawn succeeding, as "she emerged at daybreak from the zone of darkness" after sixteen hours of night and thirty knots speed, it is computed that the outer lines of the blockading force "might well be four hundred and eighty miles off."[40]

"Article 19. Whatever may be the ulterior destination of a vessel or her cargo, she cannot be captured for breach of blockade if, at the moment, she is on her way to a non-blockaded port.

"Article 20. A vessel which has broken blockade outwards or which has attempted to break blockade inwards, is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned or if the blockade is raised her capture cannot longer be effected."

As Admiral Stockton, Plenipotentiary Delegate of the United States to the Conference, states,[40] "article 19 exempts a vessel bound for a non-blockaded port from capture for breach of blockade no matter where she or her goods are ultimately bound. This article prevents the application of the doctrine of continuous voyage as to blockade and is a concession upon our part as we were the only power holding to the contrary."

By article 30, "absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy or to the armed forces of the enemy. It is immaterial whether the carriage

[39] See Supplement to Amer. Jour. Intern. L., July, 1909, p. 179 *et seq.*

[40] See the article by Admiral Stockton, 3 Amer. Jour. Intern. L., 604.

of the goods is direct or entails transhipment or a subsequent transport by land."

By article 33, "conditional contraband is liable to capture if shown to be destined for the use of the armed forces or of a government department of the enemy state."

By article 36, "notwithstanding article 35 as to destination, conditional contraband, if shown to have the destination referred to in article 33, is liable to capture in cases where the enemy country has no seaboard."

"Article 37. A vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerent throughout the whole of her voyage, even if she is to touch at a port of call before reaching the hostile destination."

The Declaration of London, as seems obvious under the federal Constitution, cannot modify the law of the United States unless it is ratified by the federal Senate. The writer has the written opinions of Admiral Stockton and Professor George G. Brown, the representatives of the United States, at the Conference to that effect, that of the Department of State of the United States and of Senator Henry Cabot Lodge, chairman of the Committee of the Senate on Foreign Relations. The Declaration was long since submitted to the Senate, but action has been delayed, as this writer was advised, at the request of the President on account of some matters of translation, and he was advised in June that it was still delayed at the request of the Department of State.

In 1899 the Supreme Court of the United States decided in The Adula,[41] a case arising from the blockade of the Cuban coast, that it would not modify its doctrine that a ship sailing to break blockade was liable to capture and condemnation as soon as she left the territorial water of her initial port, and that this view would be in no way changed on account of the opinions of foreign writers. From this it may be argued that the important consensus of foreign writers and learned authorities expressed by the International Conference against the doctrine of continuous voyage cannot be received to modify the rule of that court, and so of the nation whose chief tribunal it is, until Congress sees fit to make such modification by statute, or until the treaty-making power, namely, the

[41] 176 U. S. 361.

President and Senate, by proper negotiations and ratification alter the rule.

This writer applied to the United States Consul-General at London to learn whether the Declaration of London of February, 1909, had been ratified, and was advised in return under date of June 1, 1910, that there had been no ratification of the same.

It therefore, after the lapse of a year and a half, has failed to become the law of any nation.

My honored and learned friend, Professor Westlake, has very ably opposed the German doctrine that the laws of war are liable to be overridden by necessity,[42] answering the arguments of Lueder that the commanders will act on the dictates of necessity whatever may be laid down, and will not submit to defeat or ruin in order not to violate formal law. Dr. Westlake says, "This ground reduces law from a controlling to a registering agency." Admitting the force and dignity of this conception, yet in the grim struggle for existence between two nations, where human life is as nothing, a formal rule as to property which represents a fiction, a pretense, or a device will be apt to be disregarded. A blockade-running venture from a European port to the coast of the Southern Confederacy was full of dangers, but from Nassau to Charleston it was almost assured of success. Thus Mr. Thurlow Weed wrote Hon. John Bigelow, June 27, 1863, "A line of steamers from Nassau to Charleston has only lost thirteen out of one hundred and forty trips," less than ten per cent.

The blockade of the southern coast of the United States in the war of the Confederacy still stands as the great blockade of history, and the rules evolved by the United States courts at that time and administered with the official acquiescence of all other powers, and which were not discredited by the international commission acting on claims arising therefrom, cannot be said to be abolished even by the widest scholastic criticism. The Japanese regulations in the last blockade favor them, and they seem essential to the efficiency of blockade, and that is still one of the least bloody and most pacific, even though reducing operations of war, one of the least cruel and embittering forms of "belligerent coercion."[43]

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[42] International Law, Part II, War, 115.

[43] See remarks of the writer in an article in Amer. Jour. Intern. L., July, 1908, 474.

THE NEW FEDERAL STATUTE RELATING TO LIENS ON VESSELS.

THE sixty-first Congress just before adjournment passed an act of great importance to the ship-furnishing and ship-owning interests of the country, and one which ought to be welcomed by the admiralty bar; for it is believed that this law will work a vast improvement in the practice of an important branch of the maritime jurisprudence of the United States. The act referred to is entitled, "An Act Relating to Liens on Vessels for Repairs, Supplies, or Other Necessaries," and was signed by the President June 23, 1910.

Much has been accomplished of late in furtherance of uniform legislation by the several states on branches of the law dealing with questions arising in commercial transactions, and where uniformity is most needed, such as the law of sales and the law of negotiable instruments. In this way one of the disadvantages of our system of government by a federation of sovereign states is being avoided. But not alone in the field of the common law has the want of uniformity been manifest. For years the law of the United States relating to liens on vessels for necessaries existed in a state of almost hopeless confusion, the result of misconceived and conflicting precedents and the provisions of the varying state statutes dealing with "domestic" vessels, so called. Believing that reform could best be secured by means of an act of Congress, which body, indeed, alone possessed the authority to treat of certain features of the law, the Maritime Law Association of the United States, at its annual meeting in May, 1908, appointed a committee to draft a measure upon the subject which Congress should be asked to enact. A bill was adopted by the Association which subsequently received the indorsement of the American Bar Association and the support of many ship-owning and ship-furnishing interests as a much-needed attempt to simplify the law and to make it uniform throughout the country. And Congress so far approved the undertaking as to pass the bill, with but one slight amendment hereafter referred to. The law thus enacted is the subject of this article.

As a preliminary to a discussion of the Act, some review of the state of the law is necessary. The writer treated of the matter at length in an article which appeared in a former number of this Review.[1] For present purposes it is sufficient to say that the most conspicuous sources of confusion in the American law were (1) the division of vessels into two classes with respect to necessaries, namely, "foreign" and "domestic" vessels; and (2) the doctrine of presumption of credit to the owner.

The division of ships into two classes in lien cases was the result of the decision of the Supreme Court of the United States in The General Smith,[2] decided in 1819. There it was held that when necessaries were furnished a ship in a port of a state to which she did not belong, a lien was given by the general maritime law, but that when necessaries were furnished in a port or state to which the ship did belong, the case was governed by the municipal law of the state, and that no lien was implied unless recognized by that law. This ruling was contrary to the law of continental Europe (which takes no account of the domicile of the vessel) and to the theory, if not the practice, of the law of the admiralty courts of Great Britain, and was soon recognized to be a mistake, though just how the mistake happened to be made is not quite clear, for the opinion in the leading case is short and devoid of citations. Various explanations have been offered. In the first place it is to be noted that on the Continent there is little, if any, distinction between the municipal law and the maritime law. Mr. Justice Brown characterized the decision in The General Smith as "a relic of the prohibitions of Westminster Hall against the Court of Admiralty," [3] from the fact that the English admiralty courts assumed to recognize the right of a materialman to proceed against the vessel for necessaries furnished in England, but were prevented from taking jurisdiction of such claims by the common-law judges.[4] Judge F. C. Lowell accordingly explained the error as due to Story's failure to perceive clearly the "difference between jurisdiction and substantive law." [5] In a paper read before the American Bar Association in 1908, Mr. Edgar H. Farrar said that the rule of the civil

[1] 21 HARV. L. REV. 332.

[2] 4 Wheat. (U. S.) 438.

[3] The Roanoke, 189 U. S. 185, 194.

[4] See The Champion, Brown, Adm. 520, 531; The Zodiac, 1 Hagg. Adm. 321, 325; 2 Parsons, Shipp. & Adm., 322.

[5] The Underwriter, 119 Fed. 713, 740, 742; and *cf.* 1 Bell, Com. 527.

law which gives a lien on both foreign and domestic vessels "was never admitted in England," and that therefore the decision in The General Smith differed from the English as well as the Continental law and jurisdiction.[6] The origin of the mistake is perhaps not important, but the insistence upon the ruling by the Supreme Court of the United States was of grave consequence to the American admiralty law.

The decision in The General Smith left it to be determined by the law of each state whether a lien should be implied for necessaries furnished a vessel of the state. In Peyroux *v.* Howard [7] the Supreme Court sustained the lien given by the Civil Code of Louisiana, and the common-law states of the country were not slow in passing statutes conferring liens for supplies furnished by resident materialmen. These statutes were upheld in the case of domestic vessels, and an anomalous situation was created, which resulted in much confusion. The "home state" in which the vessel was said to be "domestic" was identified with the state of ownership; in the ports of every other state, even of other states of the Union, the ship being regarded as a "foreign" vessel. This division was in itself artificial, for the states as such have no vessels. All American vessels are vessels of the United States, and no American vessel is in a foreign port when in a port of the United States.[8] Further, the absence of any requirement in the statutes of the United States that the owners of an American vessel should live in the same state made it difficult in many cases to decide for the purpose of liens for necessaries just what state was the "home" state of the vessel. Some courts were led to intimate that a vessel might have more than one home state, or, at least, be "domestic" in more than one state;[9] and Mr. Justice Johnson once described home port as "an epithet which, it is very easy to perceive, has no necessary reference to State or other limits."[10] Finally, the most conspicuous anomaly which the recognition of the state laws introduced into our practice was that the lien, although conferred by a state statute,

[6] The Extension of the Admiralty Jurisdiction by Judicial Interpretation, 33 Reports Amer. Bar Assoc. 479.

[7] 7 Pet. (U. S.) 324.

[8] Benedict, The American Admiralty, 3 ed., sec. 273.

[9] The Rapid Transit, 11 Fed. 322, 329–330; Stephenson *v.* The Francis, 21 Fed. 715, 717, 718.

[10] The St. Jago de Cuba, 9 Wheat. (U. S.) 409, 417.

could be enforced in the federal courts alone, inasmuch as, the subject matter being maritime, it came within the exclusive grant of the admiralty and maritime jurisdiction, by the Constitution, to the national courts.[11]

Another result of The General Smith was that a great and unnecessary burden was placed upon the federal courts; for the state statutes varied greatly in their scope and phraseology, and the task of construing them uniformly proved very difficult. Indeed the burden was found so great that in 1858 the Supreme Court amended the Twelfth Admiralty Rule by taking away the right to proceed *in rem* in the case of domestic vessels, and Taney, C. J., declared, in explanation of the change, that the duty of interpreting and enforcing the state statutes was "entirely alien to the purposes for which the admiralty power was created." [12]

The doctrine of presumption of credit to the owner was promulgated in the case of The St. Jago de Cuba,[13] in which Johnson, J., said (1) that it was not in the power of anyone except the master to give implied liens on a vessel, and (2) that when the owner was present the contract was inferred to be made on his ordinary responsibility, without a view to the vessel as the fund from which compensation was to be derived. Like the ruling in The General Smith, the doctrine of The St. Jago de Cuba seems to have had no counterpart in the law of Europe. It was, however, retained in the American law, at least in the case of contracts made by the owner in person, the accuracy of the first proposition of Johnson, J., being questioned by Mr. Justice Clifford in The Kalorama,[14] and the law in effect restated by the court in The Valencia,[15] where it was said that "in the absence of an agreement, express or implied, for a lien, a contract for supplies made directly with the owner in person" carried with it no claim upon the *res*.[16]

While no difficulty resulted from the enforcement of this rule where necessaries were ordered by the owner in a foreign port, much

[11] The Glide, 167 U. S. 606.

[12] The St. Lawrence, 1 Black (U. S.) 522, 530–531.

[13] 9 Wheat. (U. S.) 409, 416, 417 (1824).

[14] 10 Wall. (U. S.) 204, 214, 215.

[15] 165 U. S. 264, 270, 271.

[16] *Cf.* The Rapid Transit, 11 Fed. 322, 329, where Hammond, J., says, speaking of the owner, "his mere presence would not perhaps avoid the lien, but if he buy the supplies and be of credit and have the opportunity to give his own security . . . there is no *implied* lien."

confusion arose over the question as to whether or not "an agreement, express or implied," was essential to the establishment of a lien in the case of necessaries ordered by the owner in a home port. Some courts, following the *dictum* of the Circuit Court of Appeals for the Sixth Circuit, in The Samuel Marshall,[17] an opinion written by Judge Taft, held that some evidence that the vessel was credited was necessary to support the lien, notwithstanding the state law.[18] Other courts took the position that this interpretation defeated the very object of the local statutes, which was to confer a lien in the state where the owner was always assumed to be present.[19] In The Iris [20] it was held by the Circuit Court of Appeals for the First Circuit that under the Massachusetts statute there was no necessity of either alleging or providing that credit was given the vessel by mutual agreement. An attempt was made in this case to bring the question to the attention of the Supreme Court, but the court refused to entertain a writ of *certiorari*,[21] with the result that a sharp conflict of authority continued to exist among the lower federal courts.[22] The decision in The Iris was construed as standing for the proposition that state statutes silent upon the subject of credit created a conclusive presumption of credit to the vessel and a consequent lien.[23] In The Vigilant [24] the Circuit Court of Appeals for the Third Circuit took a middle ground, holding that in such cases the necessaries ordered were presumed to be on the credit of the vessel unless the contrary was shown, a view which seems to accord with the theory of the French law. Thus, Émérigon says, speaking of a claim for the construction of a vessel (which under the Continental law is treated in this respect like a claim for necessaries), that the debt is privileged unless it be shown that the materialman "trusted the person and not the thing." [25]

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[17] 54 Fed. 396.

[18] See Lighters Nos. 27 & 28, 57 Fed. 664 (C. C. A., 9th Cir.); The Electron, 74 Fed. 689 (C. C. A., 2d Cir.); and *cf.* The Advance, 60 Fed. 766; The Westover, 76 Fed. 381; The Sappho, 89 Fed. 366.

[19] The Alvira, 63 Fed. 144; The Illinois, White & Cheek, 2 Flipp. (U. S.) 383; The Iris, 100 Fed. 104 (C. C. A., 1st Cir.); The Vigilant, 151 Fed. 747 (C. C. A., 3d Cir.).

[20] 100 Fed. 104, 110–112.

[21] Woodworth *v.* Nute, 179 U. S. 682.

[22] *Cf.* The Golden Rod, 151 Fed. 8.

[23] The City of Camden, 147 Fed. 847, 849.

[24] 151 Fed. 747, 750, 753.

[25] 2 Émérigon, Traité des Assurances et des Contrats à la Grosse, Boulay-Paty ed. c. xii, sec. 111; Benedict, Adm., 144.

To meet the situation thus outlined the present federal statute was framed. How it meets the situation and what the Act attempts to accomplish, it is the purpose of this article to explain.

The text of the Act follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

SEC. 2. That the following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

SEC. 3. That the officers and agents of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel, but nothing in this Act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor.

SEC. 4. That nothing in this Act shall be construed to prevent a furnisher of repairs, supplies, or other necessaries from waiving his right to a lien at any time, by agreement or otherwise, and this Act shall not be construed to affect the rules of law now existing, either in regard to the right to proceed against a vessel for advances, or in regard to laches in the enforcement of liens on vessels, or in regard to the priority or rank of liens, or in regard to the right to proceed in personam.

SEC. 5. That this Act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings in rem against vessels for repairs, supplies, and other necessaries."

It will at once be observed that, generally speaking, the Act does three things: (1) It does away with the artificial distinction between foreign and domestic vessels in the matter of liens for necessaries;

(2) removes the presumption of credit to the owner; and (3) supersedes the state statutes in so far as they confer liens for supplies, repairs, and other necessaries.

The last result is accomplished by section 5 of the Act. As originally worded, this section read:

"That this Act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action against vessels for repairs, supplies, and other necessaries."

The words "to be enforced by proceedings in rem" were added in the Senate because of the fear, expressed by some members of the Judiciary Committee, that otherwise the Act might be construed to prevent the attachment of a vessel in a suit against the owner in a state court. Needless to say it was not intended that the Act should have this effect, and it is believed that the section in question could not be construed to have any such effect. The Act deals with maritime liens, enforceable by proceedings *in rem*. A right of action against a vessel is a right *in rem*. A claim against the owner is in no sense a right *in rem*, and the mere fact that the vessel is attached as collateral security does not make the cause an action *in rem*. Further, section 4 expressly provides that the right to proceed *in personam* shall not be construed to be affected by the new law. And the judiciary act which conferred upon the district courts of the United States jurisdiction of admiralty and maritime causes contained the following reservation: "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." Says Mr. Justice Clifford in The Belfast,[26] in explanation of the reservation:

"Examined carefully, it is evident that Congress intended by that provision to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy. Properly construed, a party under that provision may proceed *in rem* in the admiralty, or he may bring a suit *in personam* in the same jurisdiction, or he may elect not to go into admiralty at all, and may resort to his common-law remedy in the State courts or in the Circuit Court of the United States, if he can make proper parties to give that court jurisdiction in his case."

A striking illustration of this separation of rights at common law and rights in admiralty is to be found in the case of Leon *v.* Gal-

[26] 7 Wall. (U. S.) 624, 644.

ceran,[27] where an action against the owner by seamen suing for their wages in a state court, with an attachment of the vessel under the state law, was sustained by the Supreme Court of the United States. Out of an abundance of precaution, however, the amendment of the fifth section was made, and for the sole purpose of making it certain that the section should not be construed to vitiate the right of attachment granted by the states in suits at common law.

The distinction between foreign and domestic vessels in the matter of liens for necessaries is avoided by section 1 of the Act which provides that the lien shall exist whether the vessel be foreign or domestic, and puts upon the same footing necessaries furnished in the home state of the vessel and necessaries furnished in a foreign port or state. The first section also removes the presumption of credit to the owner in the case of contracts made by him, and simplifies the law by making the lien depend upon a contract by the furnisher with one in authority to bind the vessel for necessaries. The owner is primarily the person to lien the vessel, and those presumed to have this authority in addition to the owner are designated in section 2. In so far as the persons thus enumerated are concerned the Act makes little if any change in the law. Further, it is provided in the first section, in an attempt to do away with all confusion about credits in the future, that no allegation or proof that the vessel was credited shall be required in order to sustain the lien. Except as called for by the ruling in The Valencia,[28] in the case of necessaries ordered by the owner in person, the element of credit to the ship was never, practically speaking, of much consequence. The crediting and pledging of the vessel was a fiction and nothing more. Indeed, the lien was termed an implied lien, and it was held in one case[29] that the "express or implied" agreement for a lien required by The Valencia did not serve to create a lien *de novo*, but only to rebut the presumption that the owner alone was credited. Inasmuch, therefore, as the new statute undertook to do away with the distinction between domestic and foreign ports and with the presumption once said to attach to the owner's presence in any port, the requirement of proof that the vessel was credited seemed unnecessary, and, if retained, more apt to continue the confusion which it was the express purpose of the Act

[27] 11 Wall. (U. S.) 185. [28] 165 U. S. 264, 271. [29] The Ella, 84 Fed. 471.

to avoid. The furnisher credited the vessel in the past, so far as he understood the requirement, by charging the necessaries to the vessel and believing in consequence that he was secured. Doubtless he will continue to enter his charges against the vessel in the future.

The last provision of the first section does not mean, however, that the lien shall exist *regardless* of the question of credit. Although the reforms in the law are accomplished largely by the first section, the Act must be read as a whole and section 4 provides that nothing in the Act shall be construed to prevent a furnisher from waiving his right to a lien at any time "by agreement or otherwise." The effect of the law, therefore, is to say that when necessaries are furnished a vessel upon the order of one in authority to procure them, they shall be presumed to be on the credit of the vessel, and that a lien shall exist therefor, — an implied hypothecation which may be enforced by a proceeding *in rem*. The furnisher may surrender his claim on the *res* affirmatively, or he may lose it by laches in the enforcement of the claim. But the burden is upon the person disputing the lien to show that the same has been waived. And unless it be shown that it was understood or agreed between furnisher and orderer that the vessel should not be held responsible, the credit of the vessel is implied by the law, and a valid claim against the vessel established which the furnisher may enforce if he proceed with diligence. The theory of the Act in this respect is similar to that of Judge Gray in his construction of the Pennsylvania statute in The Vigilant,[30] which statute the learned judge interpreted to mean that supplies ordered by the persons designated "are presumed to be on the credit of the vessel (unless the contrary is shown)." Speaking of the lien conferred he said, "Of course, like any other privilege or advantage given by law, it can be waived, and *an understanding between the parties, that no such lien is contemplated*, would be effective for that purpose." And again, "The burden, therefore, of showing an express repudiation of such a pledge known to the one who claims the lien rests upon him who undertakes to rebut its implication." This construction introduces no new theory into the maritime law of America, but merely applies to the case of necessaries ordered by the persons designated, and in all ports, the familiar rule of the general law in the case of con-

[30] 151 Fed. 747, 753.

tracts by the master when in a foreign port. In such cases it was a presumption of law that the necessaries were furnished on the credit of the ship, and proof was not required of any "express pledge," "special agreement," or "stipulation" to that effect.[31]

The persons enumerated in section 2 in whom authority to bind the vessel for necessaries is to be presumed are the agents who would ordinarily act for the vessel in fitting her out and maintaining her in condition. The clause, "or any person to whom the management of the vessel at the port of supplies is intrusted" is doubtless an elastic one. Supplies furnished to a vessel in Boston upon the order of the ship's New York agent would seem to be furnished upon the order of the person to whom the management of the vessel at the "port of supply" is intrusted in the absence of an authorized agent of the vessel at Boston. Section 2, like the first section, is not to be read alone, and must be construed in connection with the third section. When thus construed, it will be observed that although authority to bind the vessel is presumed in the case of certain officers and agents, the owner is not precluded by the Act from restricting the authority of any officer or agent, whether one of the designated few or not; and if the furnisher know that for "any reason" the person ordering the necessaries is without authority to bind the vessel, no lien arises. This brings the law into accord with the conduct of the modern business of shipping. On the larger lines the master now has very little to do with the furnishing of the vessel, even when in a foreign port, this duty being attended to by an agent on shore, or by some other officer of the ship or of the company that owns it. In this particular, furthermore, the Act does no violence to the maritime law. Even in the case of necessaries ordered by the master in a foreign port no lien was implied if the master had funds or credit which he could use to meet the expenses incurred, and the possession of such funds or credit by the master was known to the furnisher or if he ought to have known of them.[32] For the law has never assisted a ship's agent to practice a fraud upon the owner. The Act does not mean, nevertheless, that the furnisher shall not have the right to rely upon the authority to bind the vessel presumed to exist in the officers and agents specified in the

[31] The Emily Souder, 17 Wall. (U. S.) 666, 670–671; The Eliza Jane, 1 Sprague (U. S.) 152, 153.

[32] The Kate, 164 U. S. 458, 467 *et seq.* and cases cited.

second section. It is only when he knows that such officers or agents do not have the requisite authority, or under the circumstances is put upon inquiry as to their powers, that the presumption becomes inoperative. There must be an actual restriction of authority by the owner in the first place, and in the absence of affirmative knowledge of such restriction, or of circumstances which ought to raise a doubt in his mind, the furnisher is entitled to rely upon the presumption and will acquire a lien, even if the officer or agent in fact has no authority. Just what circumstances shall be said to give rise to a doubt or to put the furnisher upon inquiry must be left to the courts to decide, as the cases come before them. But the furnisher must not be denied the benefit of the presumption for trivial circumstances. The question is largely one of his good faith, and the law does not require of him more than a reasonable inquiry. If the furnisher make an honest effort, through readily available channels, to ascertain the authority of the orderer in cases calling for an inquiry, he would seem to have satisfied the law. And if such inquiry fail to disclose absence of authority the lien will attach by virtue of the presumption. For it is only when the furnisher "*could have ascertained*" by the exercise of reasonable diligence that the orderer in fact had no authority that no lien is created. If, however, the officer or agent is unlawfully in possession or charge of the vessel, no lien arises, notwithstanding the presumption.

Section 3 states further the law relating to necessaries furnished chartered vessels and vessels operated by a person other than the real owner in respect of which there was previously some conflict of opinion.[33] No distinction is now made between a charterer and an agreed purchaser in possession of the vessel in so far as the contracts of the officers and agents presumed to have authority to bind the vessel are concerned. The furnisher acquires a lien when dealing with them unless he knows that their authority is restricted by the terms of the charter or agreement for sale of the vessel, or, in the words of the Act, "by the exercise of reasonable diligence could have ascertained" that they were without authority to bind the vessel. The phrase quoted is one of three used by Mr. Justice

[33] *Cf.* The India, 16 Fed. 262; The Lime Rock, 49 Fed. 383, 384 (charterer); The Garonne, 160 Fed. 847 (owner *pro hac vice*). *Contra*, The H. C. Grady, 87 Fed. 232, 239 (agreed purchaser); The Iris, 100 Fed. 104 (agreed purchaser under state statute), and see Professor Hughes' article on Maritime Liens, 26 Cyc. 781–782.

Harlan in two cases where there was a charter limitation, the statements being so made by the court as to be treated as synonymous expressions. In the first of these cases, The Kate,[34] the court denied the lien because they were of the opinion that

"the libellant knew or under the circumstances is to be charged with knowledge that the charter-party under which the Kate was operated obliged the charterer to provide and pay for all the coal needed by that vessel."

And in The Valencia,[35] the same court said that the furnisher acquired no lien

"if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter-party, but he failed to make inquiry and chose to act on a mere belief that the vessel would be liable for his claim."

The phrase, "knew, or by the exercise of reasonable diligence, could have ascertained," is adopted from The Kate,[36] and was used in the Act of Congress to make it clear that if the furnisher know of the existence of a charter-party or of an agreement for the sale of the vessel, he is put upon inquiry as to its terms, and cannot excuse himself by denying ignorance of the terms, should it turn out that the charterer or agreed purchaser had undertaken to furnish the vessel at his own cost.[37]

With respect to advances, the law is left as it was.[38] To entitle the lender to proceed against the *res*, the advances must be made on the credit of the ship to pay claims which are in themselves liens and must actually be used to satisfy such claims.[39] And "such

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[34] 164 U. S. 458, 465. [35] 165 U. S. 264, 272, 273. [36] 164 U. S. 458, 470.

[37] In The Underwriter, 119 Fed. 713, 764, Judge F. C. Lowell seemed to infer that another rule might obtain if the supplies were furnished in a "port of distress." Whether this would be so under the new Act may be questioned, especially when it is considered how readily the owner can be communicated with, under modern conditions, from all points of the world. Whether a charterer who has control and possession of a vessel under a charter-party requiring him at his own cost to provide for necessaries may, under any circumstances, pledge the credit of the vessel, was a point expressly reserved by the court in The Valencia, 165 U. S. 264, 272.

[38] Sec. 4.

[39] The Guiding Star, 18 Fed. 263; The Wyoming, 36 Fed. 493; The City of Camden, 147 Fed. 847; The George W. Anderson, 161 Fed. 760; The Emma B., 162 Fed. 966; The Avalon, 169 Fed. 696.

an advance not made on authority of one having the right to bind the ship does not give a lien." [40]

No statement or notice of the lien is required by the Act as a condition precedent to the creation of the lien, and the Act stipulates no period of limitation within which the lien shall be deemed to continue. In these respects the federal statute accords with the general maritime law as heretofore administered in the case of foreign vessels, and a change is made in the law relating to necessaries furnished domestic vessels, since most of the state statutes required some sort of claim to be filed in a designated registry. This requirement was annoying to ship-furnishers and offensive to ship-owners who disliked to have their vessels incumbered with a long list of claims for necessaries of all kinds. The only persons who might be said to have received a benefit from the practice were prospective purchasers of the vessel, for furnishers seldom examined the registry, and any examination would reveal only claims for necessaries furnished in the home state, which, as a matter of fact, might represent but a small percentage of the liens on the vessel. Assuming some publication of liens for necessaries to be desirable, the question arises, where and how shall it be made? Registry at a single place, as for instance the city of Washington, would, in a country as large as the United States, be, practically speaking, of little value. The home port of the vessel (even if known) would not necessarily be accessible to all interests as a place of public record, and the port of supply is open to still greater objections. Furthermore, so many registries would be required in the case of the last suggestions as to defeat the adoption of either. Some adaptation of the Italian practice which requires the lien to be entered on the ship's register or sea letter, which is carried on board the vessel, would seem to be as feasible a scheme as could be made use of in this country; but the lack of enthusiasm among ship-owners and ship-furnishers for any provision as to the recording of the lien and the difficulty of deciding upon any particular plan led to the abandonment of all provisions as to registry in the Act which is now the law of the land.

It is doubtful, moreover, if prospective purchasers are likely to suffer any detriment because of the absence of a requirement that a claim of lien shall be recorded. Section 4 says that the Act shall

[40] Hughes, Maritime Liens, 26 Cyc. 764–765.

not affect the law relating to laches. In determining whether or not a lien has become stale, a most important consideration is the existence of the claims of third parties which have come into being during the period when the lien claimant could have enforced his claim against the vessel, and of these intervening rights perhaps the most important are those of *bonâ fide* purchasers of the vessel.[41] The doctrine of laches as administered by the courts has worked well in the case of liens conferred by the general maritime law, and it was felt that the ends of justice would be better served if in place of a fixed period of limitation in the new statute the doctrine of laches were made applicable to all liens for necessaries. Any limitation to be just must have some exception, to provide for the case where the furnisher is unable to proceed against the vessel during the stated period, notwithstanding the exercise of reasonable diligence on his part. In some cases it would be unjust to allow a lien to be enforced, even if the established period during which the lien was to continue had some time to run. On the whole, therefore, it was deemed wisest to leave the matter of the continuance of the lien to the courts, and it is believed that the result will be the most desirable one of causing lien claimants to enforce their claims with diligence.

We have been speaking of the provisions of the new Act. It is now pertinent to inquire just what claims are embraced by the Act. The title and some of the phraseology of the federal statute are taken from the Twelfth Admiralty Rule of the Supreme Court, which rule relates to "suits by materialmen for supplies or repairs or other necessaries." In the classic language of Sir Leoline Jenkins,[42] "Those are commonly called materialmen whose trade it is to build, repair or equip ships or to furnish them with tackle and provision (necessary in any kind)." The word "necessary" in this connection has never been construed in this country to mean what is absolutely essential to the needs of the ship, but rather what is fit and proper for the vessel and what a prudent owner would order.[43] On the other hand, "necessaries" have not been taken to comprehend all the services that a ship may require.[44] As used in the

[41] See Hughes, Handbook of Admiralty Law, 94, 95.

[42] Quoted by Sir John Nicholl in The Neptune, 3 Hagg. Adm. 129, 142.

[43] The Grapeshot, 9 Wall. (U. S.) 129.

[44] See Hughes, Adm. Law, 96–97.

Twelfth Rule the term "other necessaries" would seem to mean other *like* necessaries, and to embrace "necessary" materials, furnishings, fittings, and appliances of all kinds appropriate to the vessel. In the new statute the term is made to include specifically "the use of dry dock or marine railway," an addition to the Act which some parties have thought to be unfortunate. It is therefore worth while to consider what effect the insertion of these words has upon the meaning of the word "necessaries" and the scope of the law. If the use of a dry dock or a marine railway is a necessary, then why not the use of a dock or wharf; and if dockage and wharfage come within the scope of the Act, do other services that may be rendered to a ship?

In a case decided in 1871,[45] and before the Twelfth Rule was amended for the second time so as to provide once more for the enforcement of liens on domestic vessels, Benedict, J., was called upon to decide whether an action *in rem* could be maintained for "wharfage" furnished to a domestic vessel. In his opinion the learned judge stated that he had "failed to discover in the maritime law any general distinction between foreign and domestic vessels in respect to demands like this." The doctrine of The General Smith, he observed, had been applied by the Supreme Court only to the contracts of materialmen, ought not to be extended to other contracts, and a wharfinger was not a materialman. He accordingly allowed the lien notwithstanding the fact that the rule of practice then in existence made no provision for actions against domestic vessels. The case of *Ex parte* Easton, decided by the Supreme Court in 1877, made it questionable whether a lien arose for wharfage furnished in the home state.[46] But Judge Benedict's view of the nature of the service was acquiesced in by Addison Brown, J., in The Allianca,[47] in which case that learned judge remarked that "a wharfage service, as respects immediate need, and the absence of opportunity for personal dealing or inquiry, is most analogous to towage, pilotage, or salvage, which, aside from statute, give a lien on domestic vessels." It will be noted, however, that the language used by the court is somewhat guarded, and in a later case the same judge referred to the decision of Benedict, J., as establishing the proposition that a maritime lien

[45] The Canal Boat, "Kate Tremaine," 5 Ben. (U. S.) 60.
[46] 95 U. S. 68, 75.
[47] 56 Fed. 609, 613.

exists for wharfage furnished to a domestic vessel "when the wharfage is obtained in the ordinary course of navigation, on the engagement of the master or officers of the ship."[48] In the second case Brown, J., found that the wharfage was not furnished in the ordinary course of navigation or upon the request of an officer of the ship, but in accordance with the terms of an unsigned memorandum of agreement previously drawn up between the libellant and the president of the steamship company. "In all cases," says the Court (citing The Samuel Marshall[49]), "to sustain a maritime lien there must be either in fact or by presumption of law a credit of the ship; and whenever such credit is negatived by the evidence, no such lien, whether maritime or statutory, will be recognized." The lien was denied for two reasons: (1) because the contract embraced other valuable considerations, the supply of which would give no lien upon the ship; and (2)

"because the evidence indicates beyond doubt, as it seems to me, that the dealings were upon a personal contract between the two companies which did not look to any credit of the ship, but only to the personal responsibility of the steamship company."

The dismissal of the case was well justified by the finding that the agreement "embraced considerably more than ordinary wharfage rights," and there was abundant evidence that the services were not furnished on the credit of the vessels concerned. But the language of the court, taken in connection with the citation of The Samuel Marshall, seems to infer that in the case of contracts made by the owner in person, the law as to wharfage is like the law governing supplies and repairs, which, if true, furnishes a reason why the former service should be held to be covered by the Act of Congress in order that there may be uniformity with respect to the element of credit, when the owner is a contracting party. And wharfage would clearly appear to be brought within the scope of the Act by the specific enumeration among "other necessaries" of the use of a dry dock. Indeed in The George W. Elder,[50] the District Court of Oregon sustained a lien for "dry dockage" under a state statute creating liens on domestic vessels for supplies, materials, and "wharfage," thus indicating that the services were regarded as kindred in character.

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[48] The Advance, 60 Fed. 766–767. [49] 54 Fed. 396, 403. [50] 159 Fed. 1005.

Does the list of "other necessaries" end with wharfage? At the hearings on the Act before the Committees of Congress the request was made that "towage" be added after the word "including" in the first section, because of the reference to dry docks and marine railways, and because of the fact that there seemed to be some question whether a lien arose for towage ordered by the owner.[51] This amendment was regarded by the sponsors of the Act as uncalled for and as undertaking to insert in the Act something foreign to the subject matter of the Act. The House of Representatives did not add the word "towage," and the matter was dropped in the Senate with the suggestion that the Senate Committee state in its report that towage was not enumerated because deemed to be covered by "necessaries."[52] No such statement was made in the Committee's report, and there is, therefore, some doubt as to the scope of the federal statute in this particular. The necessity that the law should be clearly understood is, however, quite as great in the case of "towage" as in that of "wharfage," for in The Daniel Kaine[53] the District Court for the Western District of Pennsylvania went so far as to say that the general maritime law gives no lien for towage rendered at the home port of the tow. This decision we believe to be erroneous and a misapplication of a doctrine relating to contracts for supplies, repairs, and similar necessaries alone. Whatever may be thought about "wharfage" it is submitted that "towage" stands upon a different footing than "necessaries," and belongs in the class of "services" with salvage, for which a lien is conferred by the maritime law without particular regard to the contract, express or implied, made for them. This distinction between supplies and repairs on the one hand, and services like salvage on the other, is well stated by the Circuit Court of Appeals for the Third Circuit in the case of The Alligator.[54] Says George Gray, J., in that case:

"There are maritime services which are usually rendered under circumstances which make them so essential to the movement of a vessel, and to the performance of her primary function, as an instrument of commerce, that the admiralty law presumes they are rendered on the

[51] *Cf.* The Columbus, 67 Fed. 553.

[52] See the printed minutes of the hearing before the Sub-Committee of the Senate Committee on the Judiciary, pp. 6, 7.

[53] 31 Fed. 746.

[54] 161 Fed. 37, 40, 41.

credit of the vessel, in the absence of proof to the contrary, and creates a maritime lien in their favor, independently of the question whether it be a domestic vessel, or not. Notable examples are the lien for pilotage services, the lien for seamen's wages, for towage services and for salvage services. The reasons for the rule in these cases are obvious, and arise out of the necessities of the situation. . . . The peculiar exigency of the situation in all these cases, supplies the reason for the rule of presumption of lien, as it has been long recognized in the administration of the general admiralty law. The exigency for such services, as are above enumerated, so generally exists, that the rule of presumption of lien is sometimes dissociated from the reason upon which it is founded. . . . So a towage service as ordinarily performed is a maritime service, which from the peculiar situation of the parties and of the circumstances of necessity surrounding it, and in the absence of proof to the contrary, creates a presumption of credit given to the vessel and a consequent lien."

Since The Daniel Kaine[55] was decided by an inferior court of the same circuit it may be assumed to be overruled by the opinion quoted above.[56] On principle the lien for towage would seem to depend upon the character of the service rendered, without relation to the identity of the person giving the order, and whether ordered in the home port of the tow or in some other port, unless it can be shown that the circumstances were such as to indicate an understanding that the tow was not to be bound for the services rendered. Under this view it is really not important whether towage is to be construed to be covered by the Act or not, and we believe the same to be true of wharfage, although wharfage seems to be included as a necessary, for the reasons that have been set forth.

We are now led to inquire what effect the new statute is to have upon contracts for a season. In Diefenthal *v.* Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft[57] it was held by the District Court for the Eastern District of Louisiana that an agreement with the owners to supply their vessels for a definite period and at a fixed price with all the provisions they might require was not a maritime contract. But this is a view which has not been taken of all such contracts, and the lien has been denied because the court was unable to find that the contract was made on the credit of the vessel.[58]

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[55] 31 Fed. 746. [56] But see The Enterprise, 181 Fed. 746, 748.

[57] 46 Fed. 397; appeal dismissed, 159 U. S. 251.

[58] See Cuddy *v.* Clement, 113 Fed. 454; Whitcomb *v.* Metropolitan Coal Co., 122 Fed. 941. A written lease of a wharf has, however, been held not to be a maritime

Assuming contracts for a season to be maritime, a lien cannot be defeated under the Act of Congress for the sole reason that the agreement was made with the owner. And unless the lien is subsequently waived it must appear from the contract itself that the credit of the owner alone was contemplated. This we believe to be true also of towage services under the general maritime law. When towage claims have been dismissed by the courts in cases involving a season contract, it has been because the contract showed that the credit of the owner was relied upon,[59] or because of other reasons than the mere fact that the owner was a contracting party.[60] As in the case of supplies and repairs no lien exists for towage rendered several vessels as a plant or without reference to any particular vessel.[61] And under the federal statute, as under the general maritime law, the things furnished must at least be "appropriated" to the use of a designated vessel.[62] For there can be no claim upon a given *res* unless it be shown that the necessaries (or services) were furnished specifically to that *res*. This is a most important consideration in the case of contracts for a season in which more than one vessel is concerned.[63]

The Act of Congress is perhaps open to criticism for not defining the meaning of the term "furnish." That an explicit definition of this word would be beneficial may be admitted, for there is at present a conflict of authority upon the subject. Thus it is set forth in some cases that no lien can exist unless the supplies and repairs are actually used by or incorporated in the vessel;[64] while others do not lay down so strict a rule.[65] But the difficulty of determining just where the line should be drawn led to the omission of any definition in the law, and the courts, as heretofore, must decide

contract. The James T. Furber, 129 Fed. 808. *Cf.* The Cimbria, 156 Fed. 378, 384–385.

[59] The Canal Boat J. M. Welsh, 8 Ben. (U. S.) 211; The Saratoga, 100 Fed. 480, 482.

[60] The Alligator, 161 Fed. 37. *Cf.* The Columbus, 67 Fed. 553, 556, in the same circuit.

[61] The Columbus, 67 Fed. 553; The Saratoga, 100 Fed. 480.

[62] *Cf.* Sewall *v.* The Hull of a New Ship, 1 Ware (U. S.) 565.

[63] The Alligator, 161 Fed. 37.

[64] The Cabarga, 3 Blatchf. (U. S.) 75; The Daniel Kaine, 31 Fed. 746, 748.

[65] The James H. Prentice, 36 Fed. 777. *Cf.* Aitchenson *v.* The Endless Chain Dredge, 40 Fed. 253, 254, where the court, Hughes, J., said: "It is her contract for the materials which binds her, without any reference to the delivery or non-delivery of the articles bargained for."

upon the facts in each particular case. The view of Addison Brown, J., in The Vigilancia,[66] seems to be the one now most generally recognized, namely, that

"There can be no delivery to the ship, in the maritime sense, whether of supplies or of cargo, so as to bind the ship in rem, until the goods are either actually put on board the ship or else are brought within the immediate presence or control of the officers of the ship."

Too much must not be expected of the federal statute. First attempts at remedial legislation are not always successful, and the situation with which the Act in question had to deal was a most difficult one. It is believed that the Act meets the situation in a simple and direct manner and that it furnishes a logical solution of the difficulties which developed in the law. Neither ship-owner nor ship-furnisher is burdened unduly and a closer approach to the Continental law is brought about than has ever existed in this country. Uniformity in the maritime law of the nations is a desirable object, and the superiority of the codes of the civil-law nations of the world in the matter of liens for necessaries has long been recognized.

The new Act was passed as a regulation of the maritime law of the United States, something which the Supreme Court has many times asserted that Congress had the right to do.[67] It does not extend the maritime and admiralty jurisdiction of the United States beyond what the Supreme Court has stated to be the true limits of that jurisdiction, something which the Supreme Court has declared that neither the states nor Congress could do.[68] That a contract for necessaries is maritime, even when made in the home port, was admitted in The General Smith.[69] The power to regulate the admiralty and maritime jurisdiction of the United States rests with Congress alone. The state statutes dealing with liens for necessaries have been enforced in the absence of congressional legislation, the situation in this respect being much like the state pilotage laws, — to be enforced until Congress acts.[70] And it has long been

[66] 58 Fed. 698–700.

[67] See *In re* Garnett, 141 U. S. 1, 14; Butler *v.* Boston S. S. Co., 130 U. S. 527, 556; The Lottawanna, 21 Wall. (U. S.) 558, 577, 581, and *cf.* The Chusan, 2 Story (U. S.) 456.

[68] *Cf.* the cases cited *supra*.

[69] See 4 Wheat. (U. S.) 438.

[70] The Lottawanna, *supra*, 581. *Cf. Ex parte* McNeil, 13 Wall. (U. S.) 236; *Ex parte* Hagar, 104 U. S. 520.

assumed that Congress would some day pass a law affecting the subject of liens for necessaries.[71]

It is unfortunate that Congress cannot legislate to supersede the provisions of the state statutes conferring liens for the construction of a vessel, but so long as the Supreme Court maintains the view that a contract to build a ship is not maritime, which view it has recently reiterated,[72] the constitutional power to make the change does not appear to exist. There are, however, some remaining features of the state laws relating to liens on vessels which might well be eradicated, for not a few of the state statutes have undertaken to provide liens, not only for necessaries, but for many other claims known to the maritime law. In so far as these statutes attempt to confer a lien when one is already given by the general maritime law, they are, strictly speaking, of no effect. And when they attempt to extend the jurisdiction of the maritime law beyond the limits fixed by the Supreme Court they are unconstitutional under the decision in The Roanoke.[73]

The common misunderstanding of the scope of state authority in this particular is well illustrated by the recent decision of the Circuit Court of Appeals for the Sixth Circuit in the case of Mack S. S. Co. *v.* Thompson.[74] In that case a vessel had been substantially completed by her builders but had not been delivered, although she was paid for and a bill of sale had been given to the owners. The vessel was lying at the dock of the shipbuilding company, waiting for certain fittings which the builder had contracted to supply. Inasmuch as the river on which the company's works were situated was a small stream, likely to be swollen by spring freshets and made dangerous, the company suggested that the vessel be moved to a safer place. To this the owners agreed, and the shipbuilding company procured the tugs of the libellant to move the vessel. The towing bill not being paid, the towing company proceeded against the ship for the services rendered. In the lower court there was a decree for the libellant, from which the claimant appealed, contending in the first place that there was no admiralty jurisdiction, and in the second place that the towage

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[71] *Cf.* Bradley, J., in The Lottawanna, *supra*, 581, 582.

[72] The Winnebago, 205 U. S. 354.

[73] 189 U. S. 185.

[74] 176 Fed. 499.

was done for the shipbuilding company. Says Severens, J., writing the opinion of the Court of Appeals:[75]

"The stress of the appellant's contention is that the 'Squire' was not a completed vessel and therefore was not a subject for a maritime lien. And if the vessel was not so far complete as to come within the range of a general maritime lien it must be admitted that, if there was nothing more, this libel, which is one in rem, would fail for the lack of any lien upon the vessel. But a Michigan statute supplies this lack. Section 2 of chapter 298 of Compiled Laws of 1897 gives a lien upon watercraft constructed or being constructed for, among other things, 'towage.'"

Referring to the decree of the district judge, the court then says:[76]

"The court below seems to have put its decision upon the ground that the 'Squire' was a completed vessel ready to proceed in its business of navigation on being supplied with certain incidentals which were not a substantive [substantial?] part of the ship. We are not disposed to controvert that conclusion. But the condition of the 'Squire' puts her upon debatable ground and we prefer to rest our own decision upon the presence of the local statute. The libel is wide enough to enable the court to grant relief upon either ground."

The evidence seemed to warrant the finding of the lower court that the "Squire" was a "vessel" within the meaning of the maritime law. But the upper court having some doubt about the question of fact *preferred* to affirm the decree of the District Court on the basis of the local state statute, which gave a lien for towage on watercraft "constructed or *being* constructed"; thus, in effect, holding that a state legislature may create a maritime lien which the federal courts will enforce upon a vessel so incomplete as not to be subject to the maritime jurisdiction, a most extraordinary result for a court of admiralty to reach. If the "Squire" was not a vessel within the meaning of the maritime law, the lien for towage given by the state statute could be enforced, if at all, in the state courts alone, and if she was, as the district judge thought, a completed vessel, then it is submitted that the state statute was not operative inasmuch as the subject is covered by the general maritime law. The statutes of the states relating to repairs, supplies, and other necessaries were passed and enforced by the federal courts

[75] 176 Fed. 499, 501.

[76] 176 Fed. 499, 502.

to remedy a supposed defect in the general maritime law, it being assumed by Mr. Justice Story that the general law provided no lien for such necessaries when furnished in the home port. But the Supreme Court of the United States has never said that the general maritime law gave no lien for towage or similar services rendered in the home port of the vessel. No suggestion has been made by that court of a defect in the maritime law in that particular, and the necessity for a municipal law upon the subject, as in the case of maritime "necessaries," has not therefore existed.

It cannot be doubted that Congress has the power, under its authority to regulate the maritime and admiralty jurisdiction, to supersede the state statutes in so far as they attempt to confer liens for maritime services, but this should not be necessary; for the courts ought not to have difficulty in recognizing the distinction between what belongs to the general maritime law and what the states can do in the field not covered by that law. Let us hope that the new federal statute will be of assistance in making the line between the two clearer in the future.

Fitz-Henry Smith, Jr.

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SELDEN AS LEGAL HISTORIAN:

A COMMENT IN CRITICISM AND APPRECIATION.

[*Continued.*]

IV.

SELDEN'S aim, then, was no more and no less than the discovery of the historical truth embodied in truth-containing and truth-revealing sources. But it is one thing to conceive a noble and exacting standard for historical research, and it is quite another thing to be prepared to effect, and actually to effect, an achievement worthy of the standard. Was Selden a man whose ambitions far outran his actual capacities and his actual attainments? Or, was he fitted for his great task of grappling with the huge mass of difficult and intricate sources that barred his way to the "sanctuary of truth" into which he longed to enter? And, being fitted for that noble task, did he actually accomplish it? These are not irrelevant and impertinent questions, even as applied to Selden; and we must pause for a moment to attempt to answer them.

Both in natural qualities and in educational attainments he possessed a singularly broad and effective equipment for the carrying out of his purpose. Endowed with a wonderful memory, a fine and cool discrimination, an infinite patience and a capacity for intense industry, he commanded just those personal characteristics that are necessary for the collection, examination, and mastery of many scattered and difficult historical sources. To these features of temperament and mind Selden added an erudition so extensive and profound that John Milton but voiced the opinion of his age when he called him "the chief of learned men reputed in this land."

If we may judge from his writings themselves — and, after all, this is the best test of all — he possessed very special knowledge of all those sciences that are auxiliary to historical science and that assist the historian to that full mastery of materials which is so essential to the highest success. His works furnish indeed abundant evidence of his remarkable learning in biography and genealogy,

chronology, geography and chorography, sphragistics and heraldry, numismatics, archæology and art, epigraphy, and last — but most important of all — philology, palæography, and diplomatic.

Lord Clarendon, one of Selden's friends, declared that he was of "stupendous learning in all kinds and in all languages." Even if it be not literally true, however, that Selden was conversant with all languages, certainly — as his works bear witness — he had at his command an astonishingly large number of the western and the eastern tongues. He had indeed, as we have already seen, the highest opinion of the value of philology in historical inquiry. We should now also recognize the fact, fully and appreciatingly, that he not only believed in philological studies for other historians, but that he likewise believed in them for himself; for he certainly used his thorough philological knowledge to the best possible advantage in the task of solving his many problems in legal history.

If we remember that his work was all accomplished long before Mabillon founded the sciences of palæography and diplomatic by his great treatise *De re diplomatica* in 1681 and long before Hickes's monumental work appeared in 1703–1705, Selden's knowledge of handwritings and of documents is also of great credit to his scholarship. From the early days, when he copied records for Cotton, on down to the very last years of his life Selden was busy with manuscripts; and though no *école des chartes* was as yet ready to assist him in his studies, nevertheless, inspired by his high scholarly aims, he learned in his own school of personal examination and employment of many unprinted materials. He needed these materials for his own writings and for his editions of the works of others, and he needed them also for the practical purposes of his clients and of Parliament; and, needing them, he sought out their secrets by the aid of his own intelligence and toil and by the practical guidance of other investigators like himself. Very many passages of his writings not only disclose a delight in palæographical and diplomatic studies in and for themselves, but exhibit also a discrimination and a skill in the actual historical use of his materials worthy even of work that is now done in the light of all that Mabillon, Hickes, Madox, Kemble, Hardy, Maitland, and other scholars have taught and still are teaching the searchers of manuscript sources.

But perhaps, after all, the most valuable feature of his preparation for the work of legal historian was his legal training itself.

Undoubtedly his activities as a conveyancer, as an advocate at the Bar, and as a lawyer member of Parliament largely developed those capacities for accurate definition and statement, for clear and subtle analysis, for sound legal reasoning, and for the judicious sifting and use of evidence, which we discover in his writings. By training and by profession an English common lawyer and not himself claiming to be more than that, his legal studies yet extended far beyond the boundaries of the English law itself. He was conversant with the legal development of European and of eastern countries, and we may feel sure that if legal development in America had been in his day somewhat more advanced than it actually was, he would have been conversant with that too. By this familiarity with various legal systems he obtained a broad comparative point of view from which to look at legal development, and he acquired too a knowledge of jurisprudential notions and principles that was of the highest moment to him in his legal historical investigations.

V.

It is thus clear that Selden approached his sources with an equipment, both as regards native qualities and acquired skill and knowledge, that promised great effectiveness in the critical examination of the structure and the meaning of texts, and great effectiveness, too, in the critical employment of those texts in his historical writings. Was that promise fulfilled? Was Selden a really good and effective critic of texts? And did he really proceed upon sound methods in the use of his texts for the discovery of truth and the building up of his historical works?

He deals harshly with those who indulge in "bold but ignorant criticism" of texts — and for the very reason that he himself, whether as author or as editor, is anything but a bold and an ignorant critic. In the examination of his materials for historical writing he is indeed quick to detect a forgery and a corrupt text. To get the true reading of a text he looks at the various editions and notes their points of agreement and disagreement; he compares also the printed copy with the text of the manuscript; and he examines transcripts from the records and from other sources. He takes account of glosses. In the assignment of a text to its right date he employs not only his knowledge of palæography and diplo-

matics, but also his knowledge of the history of law. His words in the preface to his edition of the works of Hengham may be looked upon not only as an excellent expression of the high aims of an imaginary ideal editor of texts, but also as a true and enlightening account of Selden's own efforts in his own editorial work. He remarks:

"Though divers copies of Hengham were examined in preparing this, yet could not a perfect one be extracted from them all. As one helped another, choice was so made that this might be the best; which yet is not without many faulty passages. So faithfully it is published from the manuscripts that even the false language, which by consent of old copies, appeared not to be the transcriber's, but proceeded from the age's either negligence or ignorance, is religiously retained. So should the lost monuments of antient writers be given to the publick; so should we abstain from wronging their MANES. Some places, that the erring hands of such as antiently copied him corrected, are by way (amongst other observations collected in the heat of the press) noted, and either by conjecture restored, explained, or marked with asterisks, left to better judgment. The varying of letter in the print, is only to lead the reader's eye the sooner to what he may look after."

After he has once accepted his sources as authentic, he then carefully weighs them individually, one by one, and assigns to each its proper place of importance in the construction of his historical account. Thus, he looks upon a final concord as an authority of exceptional standing in the time of Henry II. Of many chartularies that of the abbey of Abingdon is singled out and given first place in his narrative, because of its special importance. Upon a certain point the Venerable Bede is preferred to the Monk of Malmesbury, for the reason that Bede "might better have known." Sometimes he fully accepts the statements of other writers; sometimes he refuses to place entire credence in them; and sometimes he rejects them quite.

Looking now for a moment not at his criticism of sources as such, but rather at his method of employing them in the building up of his historical narrative, we find that his fundamental aim is to present the authorities as a ground for the fullest "freedom of the reader's judgment." As "a ground of free judgment" the sources themselves are very often "delivered at large." Important though it be, in forming an independent judgment, to see the very

words of the sources themselves, there is no doubt that Selden carries altogether too far his habit of inserting in his writings great undigested masses from the text of his authorities; for this feature of his work checks the flow of thought in an irritating way and interferes seriously with the reader's grasp of the whole argument. But this inclusion of the texts themselves forms part of Selden's plan to let the sources and the sources alone speak the historical truth that he is desirous of conveying to the reader. "I would not wish my history," he affirms, "should gain any strength of truth from my name alone, but from my authorities cited." His task consists in showing the facts of history as they are contained in reliable sources — and there his duty ends. The reader himself may use these facts of history to argue great points of polity and philosophy — yet in that Selden, as an historian merely, has no part. But of course he does much — very much — more than simply present the bare text of his sources. He uses his authorities as a basis for his own account of historical fact; and he assumes that he must, in the cause of historical truth, draw conclusions and inferences of various sorts from his sources. This is not going beyond the facts. It is merely a way of ascertaining and setting forth the facts.

What Selden insists on doing is to present the necessary and most trustworthy sources in support of his contentions as to what the facts of the past have been; and when he has accomplished that, the citation of other and lesser authorities is a "busy vanity of hours" with which he has no patience. His principle is stated in the preface to the *Titles of Honour*. He says here: "I have used authorities of best choice, without the vain ambition of citing more than I needed. The best or first I took always for *instar omnium*." In the preface to his *History of Tithes* he tells us that his "testimonies were chosen by weight, not by number"; and in his reply to Tillesley's attack upon him he again asserts — with a thrust at Tillesley: "I affected weight [of authorities], but the doctor only number."

Having selected his authorities, he next proceeds to interpret them, and to use them in the erection of his historical fabric. He brings all his care, all his skill, and all his erudition to bear in the interpretation of words and passages in his sources. Sometimes he seeks the advice of learned friends as to difficult points. But

he believes firmly in "liberty of interpretation" for every one, and takes full responsibility for his own efforts to arrive at the meaning of his authorities. He frequently gives in a summary way the contents or essence of his sources, such as statutes and charters. He often — very often — compares and checks his sources one with another, manuscript with printed copy, primary with secondary, doom and charter with chronicle, law treatise with year book and plea roll; and he notes and explains their points of agreement and of disagreement, in order that he may ascertain the historical truth. In a truly inductive way he bases conclusions upon his sources as to the existence or non-existence of rules and principles and institutions. But he is cautious and will not conclude in a point, either one way or the other, without sufficient evidence; and he insists too on viewing the sources in their historical setting and on looking behind the sources to ascertain whether actual practice may not be, after all, at variance with them. Sometimes he gathers up the testimony of his sources, either at the beginning or at the end of a long discussion, into a short summary. He points out, if possible, errors in the historical work of others; and, though he has the courage of his historical scholarship and conviction, he is also not afraid to admit that he himself may err and that on certain points he either is or may be ignorant.

We stated just now that he employed inductive processes in arriving at historical fact. In a very true sense his whole method was essentially and fundamentally an inductive method; and it was largely because he proceeded upon this scientific method that he had such slight regard for Tillesley and others who operated upon quite different principles. In more than one passage he hit hard at those who look only for proof of their own pet theories and shut their eyes to all evidence that tends to prove the contrary. "Nay," he asks in his reply to Tillesley, "do not my examples largely shew, that the layman was the sole grantor still? And for his [Tillesley] telling you that against me, that the patron gives them the bishop. What colour, what one syllable of colour is there for any such thing in his whole charter of Gundulphus? But he would have it so, and therefore he thought that everything proved it so." "And he [Tillesley]," says Selden, "follows the common example of them which have their brains converted into their chosen conclusions, and then think everything they meet withal,

proves what they dote on." In another passage he loses patience with Tillesley and asks: "Is this your logick, doctor? We use no such in the Inns of Court." This phrase — "We use no such [logic] in the Inns of Court" — discloses to us perhaps the cause of Selden's insistence upon inductive processes in historical inquiry. As a barrister he used those processes in the study and employment of one highly important set of legal sources — the reports of decided cases. As a legal historian he applied those same processes in his endeavour to make his historical sources tell him the story of the past.

VI.

We must now examine Selden's historical works with the object of observing what method, or methods, he employed in the arrangement of his subject-matter. Did he adopt the historical method, or did he adopt the systematical method, or sometimes the one and sometimes the other? And did he ever use the comparative method?

In his *Purpose and End in Writing the History of Tithes*, Selden remarks that his work on tithes is "framed according to succession of time" and that every such history should be similarly constructed. This phrase — "framed according to succession of time" — provides us with a clue from his own pen as to the usual method which he adopted in the arrangement of his materials; for it will be found that he usually constructed his works upon the historical method. This plan enabled him to follow the "thread of time" by arranging his subject-matter in periods and by then sharply marking off the one period from the other through the individual and distinctive characteristics of each. The historical plan or method was used in the *History of Tithes;* and it was adopted also in *Of the Office of Lord Chancellor*, *The Original of Ecclesiastical Jurisdiction of Testaments*, *The Disposition of Intestate's Goods*, and in other works.

But Selden has not made the mistake of marking off his periods one from the other stiffly and arbitrarily by mere dates or by mere single events. He has not made this mistake just because of his vast and intimate knowledge of the past and just because of his true historical sense and skill; for he saw clearly that human develop-

ment is a gradual development, and that the lines to be drawn by the historian, in indicating the stages of progress, should be wavy and flexible, not rigid and inflexible lines. We may take the *History of Tithes* as an illustration. At first sight this work does not bear out the contention, for in it Selden divides the Christian era into four periods, each covering four hundred years, separated one from the other by the years 400, 800, 1200, and 1600. But it should be well noted that he is careful to allow, at each boundary between these periods, a latitude of about twenty years for the free play of forces and events that distinguished the passing from one period on into the next; and that he is careful also to show us that there is some real reason why the years of latitude between the periods really mark a transition from one to the other. Thus, he shows us that not until the close of the first period can it be proved that tenths were paid; that the beginning of the third period is marked by the exaction of tithes by the Church; and that the first part of the period from about 1200 to about 1600 is distinguished by the growing power of Canon Law.

In all his writings on English legal development where the historical method of arrangement has been adopted he displays this same care in marking off and distinguishing periods. In general he divides the whole legal history of England into the period of the Anglo-Saxons and the age from the Norman Conquest down to his own day; but he also notes various minor periods within the broad limits of these greater periods, and these minor periods are usually marked off one from the other, for some good historical reason, by the reigns of prominent kings like Alfred, Æthelstan, Edgar, Henry II, John, Henry III, and the early Edwards.

His firm grasp of the past and his keen sense for the historical method are also manifested by his frequent references, often in picturesque terms, to great periods of development that are not narrowly limited by any definite boundaries. Thus, in one place he speaks of "inmost antiquity" and "the later ages " and in other places of "primitive times" and "the later ages," of "the eldest times of Christianity" in England, and of "the antientest times that we have in our year books." Similarly he sometimes sums up and contrasts immense periods of legal development in England by referring, for instance, to "the common laws of this Kingdom in antient time," "the later common law," and "the practised law

of this day." It is, too, because his sense for historical periods is so finely developed and because he believes that only by the noting of periods — only by the "most exquisite touchstone" of synchronism — can historical truth be properly revealed, that he frequently admonishes the reader to distinguish the "times" and is hard upon those who either fraudulently, or perhaps only negligently or ignorantly, confuse them.

In the writings composed according to the historical method there is usually some attempt to arrange the subject-matter for each period in a systematic way. But, for the most part, this attempt is not very successful; and — at any rate judged by standards of the present day — there sometimes seems to be rather the absence than the presence of anything that may be truly called a systematic arrangement. We may look for a moment at the *History of Tithes* as an illustration of his attempt at order. In the *Purpose and End in Writing the History of Tithes* Selden tells us that in this history he took up three matters: (1) the laws in regard to tithes, (2) the actual practice of paying them, and (3) the opinions held touching them. In general we find that this threefold arrangement lies at the basis of his treatment of the materials in each period; and, in addition, that he takes up at times certain special topics in a more or less systematic fashion. Thus, for example, in the period from about 1200 to about 1600 he gives the opinions of the divines, for purposes of "method," in a "threefold difference"; and in his account of tithes in England he arranges in a fivefold classification — "for order's sake" — all the original proceedings in temporal courts with regard to tithes. One might give many other illustrations of ordered treatment of his subject-matter within the separate periods; but somehow one feels that in this matter of systematic arrangement his work lacks the lucidity and the strength that one might have expected from him.

While some of Selden's works on legal development are thus fashioned after the historical method of arrangement according to periods, still others are fundamentally, or wholly, constructed upon the systematic method. The *Titles of Honour* is an example of this. Selden divides this work into two great parts. In the first part he takes up the so-called "supreme," and in the second part the so-called "subordinate" titles of honour, and in general he takes up the history of each title by itself from its origin on down throughout

its existence. Further illustrations of his systematical method of arranging his subject-matter are the *Privileges of the Baronage of England* and the *Judicature in Parliament;* for, although these works were not written primarily for scientific historical purposes, but rather for practical purposes of Selden's own day, they nevertheless trace the history of the various topics included within the scope of their systematical arrangement of subject-matter. In the *Privileges of the Baronage of England*, for instance, the main division of the work is into two parts which treat respectively of the privileges of the baronage collectively as "one estate together in the upper house" of Parliament and of their privileges, "as every one of them is privately a single baron." But, although the grand outline or scheme of the work is thus systematical instead of historical, nevertheless, under each separate heading of each of the two parts, the matter is taken up, at any rate partially, from the historical point of view; for Selden has largely adopted the chronological order in the presentation of his precedents.

Whether Selden wrote his work after the historical or after the systematical method he frequently also adopted the principle of comparison. His wide studies in the legal systems of many eastern and western lands gave him the broad outlook and the knowledge necessary to a comparative historian of law. In various passages in his writings he expresses his own sense of the importance of comparative studies, but in no passages more clearly than in the prefaces to the *History of Tithes* and *Titles of Honour* and in the *End and Purpose of Writing the History of Tithes*. There is here a perception of the fundamental maxim of all comparative studies, that the two or more things to be compared must first of all be studied and known separately and individually, and that only then can a comparison prove of any theoretical or practical value. He sees indeed, with great clearness, the necessity of studying by itself the history of law in each country and in each age, in order that the results thus obtained may be made the basis of an inductive comparison. By proceeding in this fashion the comparative legal historian may note the features that are common to the development of law in many countries and in many ages and also the features that are peculiar to one or more countries or one or more ages. In this way too the influences of one legal system upon another may be definitely traced, and the great outlines of legal development

throughout the centuries may be drawn with some scientific precision and thus with actual helpfulness in the guidance of the present and future generations of men. It is this world-wide survey of legal development which strikingly characterises the work of Selden and makes it of lasting significance in the history of comparative legal studies.

Selden's writings are full of his legal historical comparisons, but in certain of his works he has adopted this method more extensively and profitably than in others. His oriental works, such as the *Uxor Ebraica*, the *De Synedriis Veterum Ebraeorum*, and the *De Jure Naturali et Gentium*, contain valuable studies in comparative legal history, as do also his *Titles of Honour*, his *History of Tithes*, and certain of his other works. One illustration may be given of the use Selden made of these comparative studies in throwing light on legal development. In the *History of Tithes* he shows, primarily by the comparative method, how the modification of ecclesiastical canons by the common law of the land was not peculiar to England alone, but was also to be observed in many other countries.

VII.

Selden's defective literary style is perhaps the chief reason why his learned tomes are now little read except for reference and why his fame in literature rests fundamentally upon his *Table Talk* and upon that alone. Stilted, harsh, prolix, obscure, cumbrous, embarrassed — these are the words that the literary critics have used and these are the words that in general his style, both Latin and English, properly merits; and, yet, not all his works deserve all these hard words, and in most of them, indeed, there are good qualities of style that, in all justice, should receive due recognition and praise.

Probably no better illustrations of his stilted and cumbrous style can be found than in his *England's Epinomis*, *Analecton Anglo-Britannicon*, *Jani Anglorum Facies Altera*, and *The Duello*. But, if it be unfair to judge him by his early and less mature writings, an examination of his later and greater works, such as the *Titles of Honour* and the *History of Tithes*, will clearly show that even they, though undoubtedly marking a great advance toward naturalness and lucidity, retain nevertheless to a certain extent the old char-

acteristics. Indeed, the English writings are weighed down by countless quotations from the many original sources and foreign literatures of which Selden was master. Statements are frequently limited and restricted by long parentheses that all too often prevent a ready grasp of the whole thought intended to be conveyed. Sometimes matter is inserted that is really appropriate to some other part of the discourse and should have been placed there. Occasionally sentences are almost hopelessly involved and of inordinate length. Subsidiary and explanatory matter is often introduced to such an extent that the reader's attention is wearied and taken from the main argument. So, too, the reader is frequently — very frequently — led off into digressions of all sorts, sometimes on relevant, but perhaps even more often on irrelevant topics. These and similar features, occasioned partly by Selden's remarkable memory of the many things he has read and partly by a certain disregard of literary proprieties, constantly check the flow of thought and thus seriously interfere with the ready and sure grasp of the whole argument.

At the same time it must be admitted that, though Selden has many sentences and parentheses of great length and complexity, both his sentences and his parentheses are in most instances short. Usually his parentheses elucidate his meaning by limiting or explaining more general statements in the main body of the text. In general, too, his cross-references assist in clarifying the thought; though some of them more properly belong in footnotes or marginal comments than in the discourse itself. Even though the insertion of great masses of original sources be in Selden's hands a defect of style, it has nevertheless its good side in giving the reader a greater opportunity of passing a free and independent judgment. It should also not be forgotten that Selden exercises much skill in framing perspicuous definitions and in choosing appropriate individual words as well as clear and striking phrases. In many sentences and shorter passages, too, his style rises to a high level of lucidity, forcefulness, and freedom from the choking effect produced by the insertion of masses of original sources and by the indulgence in long and wearisome digressions.

Selden's style is ordinarily quite solemn and grim enough for the most solemn and grim of his readers; but at times this grey sky is lighted up by quaint and striking verses culled from many an out-

of-the-way place, by vivid and picturesque descriptions, and by flashes of humour and sarcasm. Take, for example, his description in *The Duello* of one of the "combats upon imposed crimes." "John of Ansley, Knight," writes Selden, "appealed Thomas Catrington, esquire, of treason, *viz.*, that he for a great sum of money yielded up the castle of St. Saviour's in the isle of Constantine in France to the French, when as he might well have defended it, having sufficient of all provision, in quâ causâ cum eodem armigero armorum lege obtulit se pugnaturum. The matter was upon divers doubts and obstacles delayed in Edward the Third's lifetime, and proceeded as little until 3 Richard II. . . . Day was appointed, and the place at Westminster. An exceeding conflux of people was from all parts of the kingdom. . . . A little time after, the defendant is thus demanded. 'Thomas of Catrington, defendant, appear to defend thy cause, for which Sir John of Ansley, knight and appellant, hath publickly and in writing appealed thee,' and thus thrice by an herald. At the third proclamation, the esquire appears mounted on a steed. . . . The esquire entering the lists on foot, the constable and marshal produce a certain indenture made before them, by consent of the parties, containing the articles of the accusation, which were there publickly read. Catrington began to offer exception at some of them, thereby thinking to have somewhat extenuated the blots laid on him. But the Duke of Lancaster seeing him in delays, with an oath openly menaced him, that unless, according to the Duello-laws, he would admit all in the indenture, which was drawn by his assent, as free from being taxed for insufficiency of form, he should be presently drawn and hanged as a traitor. Whereupon the esquire ceased from his exceptions, and intended only the combat. [Each combatant took oath of the truth of his cause, and that he was free from all use of magic.] The combat itself follows between them. First lances, then swords, afterwards fauchions are their weapons. The esquire had still the worst, even until Ansley, although with some hazard and doubt (as you may see in the author) got the adjudged victory."

At one place on the *History of Tithes* Selden says half facetiously and half seriously: "[This] is well justified by an old rimer, that in verse, which would grieve Apollo's heart to hear, sings [bishop] Athelbero's liberality to the monastery and expresses the tithes of fourteen villages, and other places given by him, and then comes

to two churches, that he afterwards appropriated to it, Bishorst and Ichorst, and names them only as they had bans or limits and parishioners; as

> "'Bishorst cum bannis, bannos cum parochianis,
> Ichorst cum bannis, bannos cum parochianis.'"

There is quiet humour in the remark that the law in Scotland is as he has stated, "if we may believe the author [who says so], for though he speak very good language, yet he is of no such sound credit."

The *Admonition to the Reader of Sempil's Appendix* and the *Reply to Tillesley's Animadversions upon the History of Tithes* are full of good things, and must be appreciated by any lover of the quieter art of effective polemics. Thus, in the *Reply*, he refers with sly sarcasm to Tillesley's sixteenth animadversion: "For that of Christmas day, I refer it to any man, that can but read, whether St. Chrysostom do not expressly say, that he learned it in the west. If the doctor [Tillesley] had told you, there had never been a St. Chrysostom, I could but have referred you to the books that mention him." In another place he drily remarks at the end of a reference to one of Tillesley's animadversions: "Unless you [reader] think it unmannerly to ask him, what he cannot tell you; do so much as ask him, what he meant here?" A page or two further on, in reference to another point made by Tillesley, Selden concludes: "But here the subject is such a thing, that the doctor may be pardoned for talking he knows not what, in it." Again, he asks: "And why, good doctor [Tillesley], should the word *kings* there, make me think more of *Charles Martell*, than that the meeting with the word *doctor* anywhere, should presently make me think of *doctor Tillesley?*"

VIII.

When the history of English legal science comes to be written — as some day it will be — the "legal antiquaries" of the earlier half of the seventeenth century will receive that attention which they merit. Too apt are we to-day to forget these earlier historians of law and to fancy that only in our own time have scholars seriously turned their attention to the tracing of English legal development. It was these earlier scholars — Camden, Cotton, Spelman, Hale,

Selden, and others like them — who laboured at the founding of a school of English legal history; and upon their labours all subsequent centuries have built. Clear discernment of the value of legal historical studies and effective work in the sources themselves, so characteristic of the antiquaries of three hundred years ago, formed a scholarly tradition that has lasted from that day to this. Though the chiefest fruits of that tradition have come to us in our own age in the treasured works of such legal historians as Stubbs and Maitland and Ames, we do well to remember that the glory of inaugurating this tradition of sound and useful learning in the records of England's legal past belongs not to the later, but to the earlier scholars.

The present article is offered but as a slight and fragmentary comment upon the writings of one — and perhaps the greatest and most brilliant — of those early legal historians. Further and more thorough study of the work of Selden will, it is believed, only increase our respect for his ideals and attainments. Our debt to him consists fundamentally in three things of the highest importance: his noble conception of history and of the office of the historian, his example in sound historical method, his contribution to knowledge of legal development in England and in other countries. In respect of these things he was a worthy co-worker with the best legal historical scholars of the Europe of his time; and now, three hundred years later, he is worthy to be given a place among the ablest representatives of the historical and comparative school founded by his labours and the labours of other scholars like him and destined to achieve even greater things in the future than it has achieved hitherto. Though great progress has been made in the centuries since Selden's time, still, much the same standard in aims and methods and achievements that we find in present-day scholars we find also in him. It was fitting that his name should be given to the society recently founded "to encourage the study and advance the knowledge of the history of English law." It is also fitting that his own efforts in that behalf should be more thoroughly known and appreciated.

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THE MEANING OF "LEGISLATURE" IN THE FEDERAL CONSTITUTION. — In the federal Constitution, exclusive of amendments, the word "Legislature" (or its plural) occurs altogether thirteen times; in ten different connections, always meaning the state legislature. The question suggests itself whether the term is used in its popular sense of the periodical representative assembly, or in the sense of the law-making power, which may include (1) the constitutional convention, (2) the governor, (3) under a system of initiative and referendum, all the voters. In the provision for protection against domestic violence "on Application of the Legislature," it may be argued that the term cannot include the governor, for it is followed by the words "or of the Executive (when the Legislature cannot be convened)." [1] In the provision that the electors of Congressmen "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature," [2] the term cannot include all the voters, for they are not elected. It appears, from the context, that all the voters would not be included under the clause as to taking an oath to support the Constitution.[3] The same thing may be said of the section providing for election of United States Senators,[4] for all the voters do not take a "Recess" nor do they assemble in "Meeting."

Of the powers given to the "Legislature," some are really legislative and some are not; and herein, it is submitted, lies the true solution of the problem. As to the former, "Legislature" means the law-making power of the state. The provisions that the manner of electing Senators and Representatives [5] and of appointing Presidential Electors [6] may be prescribed in each state by the legislature, are in this class. Hence a

[1] U. S. CONST., Art. IV, sec. 4.
[2] U. S. CONST., Art. I, sec. 2, § 1.
[3] U. S. CONST., Art. VI, § 3.
[4] U. S. CONST., Art. I, sec. 3.
[5] U. S. CONST., Art. I, sec. 4, § 1.
[6] U. S. CONST., Art. II, sec. 1, § 2.

provision of the state constitution as to the manner of electing Congressmen cannot be overridden by an act of the assembly.[7] This may be supported on the theory either that the constitution-making body is included in "Legislature," or that members of the assembly acting contrary to the state constitution are not included in that term. The members of the assembly in joint convention cannot pass a rule that a mere plurality of the joint meeting shall elect a United States Senator; [8] only the Legislature acting through its two branches separately is competent to enact such a law. It has recently been held that an act of the assembly establishing Congressional districts is not effective until there is a compliance with a provision of the state constitution for a compulsory referendum on petition of a certain number of voters. *State ex rel. Schrader* v. *Polley*, 127 N. W. 848 (S. D.). On the same reasoning the governor might veto such an act, if the organic law of the state gives him a veto on legislation.

But where the Constitution vests other than law-making powers in certain persons designated as the "Legislature," that word should be taken in its popular sense. A joint convention of the members of the legislature may elect a Senator.[9] The right to apply for a convention to propose amendments to the federal Constitution [10] is clearly not legislative; thus the early applications for a constitutional convention by the Virginia (1788) and New York (1789) legislatures were not signed by the governors.[11] It is more doubtful in which class the power of ratifying such amendments belongs, but the gubernatorial approval seems not to have been deemed necessary. The ratification of the Fourteenth Amendment was formally approved by governors of only fifteen states.[12] No instance is known in which the ratification was vetoed. In New Jersey, the governor vetoed the attempted rescission of ratification and it was passed over his veto.[13] The consent of the legislature to the formation of new states out of the territory of old ones [14] and to the purchase of sites for forts, etc.[15] must also be taken as belonging to this latter class.

THE MEANING OF "ACCIDENT" IN PERSONAL ACCIDENT AND EMPLOYERS' LIABILITY INSURANCE. — Most personal accident insurance policies cover "injuries effected through external, violent, and accidental means." While the courts have given little effect to the words "external"

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[7] This question has arisen several times in connection with contested seats in the House of Representatives. The reports of the committee of elections and action by the House are neither uniform nor clear; but it must be confessed that authority is pretty evenly divided. See Shiel *v.* Thayer, 1 Bartlett, Contested Election Cases, 349; Baldwin *v.* Trowbridge, 2 *id.* 46; Donnelly *v.* Washburn, 1 Ellsworth, Contested Election Cases, 439.

[8] John P. Stockton, Taft, Senate Election Cases 264.

[9] Fitch and Bright *v.* Lane and McCarty, Taft, Senate Election Cases 164.

[10] U. S. CONST., Art. V.

[11] See 1 AM. STATE PAPERS (MISC.) 6, 7. Many but not all of the more recent applications have been formally approved by the governors, see 42 CONG. RECORD 5514.

[12] See 2D SESS., 40TH CONG., 2 SEN. EXEC. DOCS. No. 75; 6 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 657–660.

[13] See FLACK, ADOPTION OF THE FOURTEENTH AMENDMENT, 167.

[14] U. S. CONST., Art. IV, sec. 3, § 1.

[15] U. S. CONST., Art. I, sec. 8, § 17.

and "violent," [1] difficult questions continually arise depending on the interpretation of "accidental." [2] It is agreed that in these contracts the word should be given its popular meaning,[3] but the definition of accident [4] does not furnish an adequate legal test.[5] Often the question is left to the jury,[6] usually because there is doubt as to what the circumstances were. Whether given circumstances constitute an accident or not should, it is submitted, be a question for the court.

Three distinct classes of problems must be considered. First, what is the nature of an accident? It is not necessarily a single, sudden occurrence.[7] An accident to the insured may come from the operation of a natural force,[8] the act of an animal,[9] the act of another human being, even if injury is intended by him,[10] or a slip by the insured himself.[11] And it may be caused by the negligence,[12] but not by the design,[13] of the insured. Although judges often say that the event must be unexpected and unforeseen by the insured,[14] the actual holdings bar nothing short of mishaps foreseen and recklessly disregarded.[15]

The second problem is whether there can be a recovery for unexpected

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[1] See VANCE, INSURANCE, 569.

[2] Policies often contain express provisions which prevent such problems as are discussed in this note from arising. For a common form of policy, see RICHARDS, INSURANCE, 764.

[3] See Schmid *v.* Ind., etc. Assn., 42 Ind. App. 483, 495; U. S., etc. Assn. *v.* Newman, 84 Va. 52, 58.

[4] The definition most often quoted is that of WEBSTER'S DICTIONARY, " an event that takes place without one's foresight or expectation." For a collection of definitions, see 30 L. R. A. 206, note.

[5] See VANCE, INSURANCE, 566.

[6] See U. S., etc. Assn. *v.* Barry, 131 U. S. 100; Bailey *v.* Interstate Casualty Co., 8 N. Y. App. Div. 127.

[7] Western, etc. Assn. *v.* Smith, 85 Fed. 401 (abrasion of skin from wearing new pair of shoes).

[8] Northwestern, etc. Assn. *v.* London, etc. Co., 10 Manit. 537 (freezing); Manufacturers' Accident Indemnity Co. *v.* Dorgan, 58 Fed. 945 (drowning).

[9] Farner *v.* Mass., etc. Assn., 219 Pa. St. 71 (dog bite); Omberg *v.* U. S., etc. Assn., 101 Ky. 303 (insect bite).

[10] Fidelity and Casualty Co. *v.* Johnson, 72 Miss. 333 (hanged by mob); American Accident Co. *v.* Carson, 99 Ky. 441 (murdered).

[11] Bailey *v.* Interstate Casualty Co., *supra* (slip in injecting hypodermic needle); American Accident Co. *v.* Reigart, 94 Ky. 547 (choking while eating).

[12] Travelers' Ins. Co. *v.* Randolph, 78 Fed. 754; Schneider *v.* Provident Life Ins. Co., 24 Wis. 28. *Contra*, Morel *v.* Miss. Valley Life Ins. Co., 4 Bush (Ky.) 535. This case seems to stand alone. See 30 L. R. A. 207, note.

[13] Whitlatch *v.* Fidelity and Casualty Co., 149 N. Y. 45 (suicide); Laessig *v.* Travelers' Protective Assn., 169 Mo. 272 (suicide). But suicide while insane is an accident. Accident Ins. Co. *v.* Crandal, 120 U. S. 527.

[14] It has also been said that the event must not be one more likely to occur than to fail. See Western, etc. Assn. *v.* Smith, *supra*, 405.

[15] Apparently the only cases denying recovery for the results of an external violent event on the ground that it was foreseen are those in which the insured attacked a man under circumstances in which injury to himself was well-nigh sure to result. See Fidelity and Casualty Co. *v.* Stacey's Executors, 143 Fed. 271; Taliaferro *v.* Travelers' Protective Assn., 80 Fed. 368. Recovery has been allowed where the insured started a fight without great apparent danger to himself. Union, etc. Co. *v.* Harroll, 98 Tenn. 591; Ins. Co. *v.* Bennett, 90 Tenn. 256. And in some cases the question whether injury was foreseen or not seems not to have been considered. See Richards *v.* Travelers Ins. Co., 89 Cal. 170. Drowning during a very perilous attempt to save life has been held an accident. Tucker *v.* Mutual Benefit Life Co., 50 Hun (N. Y.) 50 (affirmed 121 N. Y. 718). See also Da Rin *v.* Casualty Co of America, 108 Pac. 649 (Mont.); JOYCE, INSURANCE, § 2863.

injuries arising from a voluntary movement, carried out as expected.[16] While some courts regard it as sufficient that the result of the movement is something unexpected and unusual,[17] others have held that the phrase "accidental means" contemplates a casualty distinct from the injury itself.[18] There is more reason for calling accidental those injuries due to the rupture of normal tissues than to the rupture of tissues so diseased that they would of themselves sooner or later give away, but this distinction seems not to have been taken.[19] Cases closely allied to this are those involving unintentional injuries from poison and unsound food.[20] These questions are all extremely nice, but as the policy should be construed most strongly against the underwriter,[21] all the contingencies mentioned in this paragraph should be covered as "injuries effected through accidental means."

The third problem is whether the policy covers disease. In personal accident insurance it is well settled that disease contracted without violence is not covered.[22] But under an employers' liability policy against loss "for damages on account of bodily injuries accidentally suffered by employees of the assured," a recovery was recently allowed where an employee was infected with glanders. *Hood & Sons* v. *Maryland Casualty Co.*, 206 Mass. 223.[23] As it is impossible to differentiate between diseases, like glanders, caused by taking *bacteria* into the system through the skin, and diseases caused by the germs' entering the system through the mouth or nostrils, the necessary result of this decision would be to allow recovery for diseases of the latter kind, whenever the employer is responsible for them.[24] This decision seems correct. While in personal accident insurance, the idea of external violence, even if not expressly mentioned, is the basis of the peril insured against,[25] in employers' liability policies the basis is liability for torts. Furthermore, one of the commonest meanings of "accidentally" is "un-

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[16] The injuries in question include sprains, ruptures of blood vessels and intestines, and injuries to the heart.

[17] See Hamlyn *v.* Crown Accidental Ins. Co., [1893] 1 Q. B. 750 (dislocation of cartilage); Horsfall *v.* Pacific, etc. Co., 32 Wash. 132 (dilation of heart).

[18] See Clidero *v.* Scottish, etc. Co., 29 Scot. L. R. 303 (displacement of colon); Shanberg *v.* Fidelity and Casualty Co., 158 Fed. 1 (fatty degeneration of heart).

[19] See Feder *v.* Iowa, etc. Assn., 107 Ia. 538, 542.

[20] But few of these cases have come up. As far as decided, the law seems to be that injury from a mistake as to the amount taken is covered, Baylis *v.* Travellers' Ins. Co., 113 U. S. 316; but not an injury due to misjudging the effect of a known amount, Carnes *v.* I. S. T. M. Assn., 106 Ia. 281; or due to unsound food thought to be sound. See Maryland Casualty Co. *v.* Hudgins, 72 S. W. 1047 (Tex.), and in the court above, 76 S. W. 745, 748 (Tex.); American Accident Co. *v.* Reigart, 94 Ky. 547, 550.

[21] This doctrine has been repeatedly mentioned in connection with this very point in accident insurance. See Northwestern, etc. Assn. *v.* London, etc. Co., *supra*, 543; Paul *v.* Travelers' Ins. Co., 112 N. Y. 472, 479.

[22] See Sinclair *v.* Maritime, etc. Co., 3 E. & E. 478 (sunstroke); Dozier *v.* Fidelity and Casualty Co., 46 Fed. 446 (sunstroke).

[23] *Accord* Columbia, etc. Co. *v.* Fidelity and Casualty Co., 104 Mo. App. 157 (kidney disease). The same result has been reached under the English Workmen's Compensation Act, where the words are "injuries by accident." Brintons, Ltd. *v.* Turvey, [1905] A. C. 230 (anthrax); Higgins *v.* Campbell & Harrison, Ltd. [1904] 1 K. B. 328 (anthrax).

[24] But see Brintons, Ltd. *v.* Turvey, *supra*, 233; Higgins *v.* Campbell & Harrison, Ltd., *supra*, 338.

[25] See Sinclair *v.* Maritime, etc. Co., *supra*, 485.

intentionally."[26] To be sure, interpreted thus, the word "accidentally" adds nothing to the meaning of the phrase, since the employer incurs no liability for injuries intentionally inflicted by an employee upon himself. But the language does not unambiguously narrow the peril to what would be an "accident" in personal accident insurance, and being capable of two fair constructions, should be construed in favor of the insured.[27]

THE DOCTRINE OF CLAFLIN *v.* CLAFLIN. — In a recent case the court, feeling itself bound by the *dictum* in *Nichols* v. *Eaton*,[1] adopted the doctrine of *Claflin* v. *Claflin*,[2] and permitted the testatrix to provide for the postponement of the enjoyment of a present vested gift until four years after the majority of the legatee. *King* v. *Shelton*, 38 Wash. L. R. 714 (D. C., Ct. App., Nov. 2, 1910). The doctrine enunciated in the principal case has been much criticized. In the first place, it is said that it tends to infringe upon the rule against perpetuities; but this is not so, for that rule determines the time within which interests must vest, but does not govern the postponement of enjoyment, the propriety of which is properly considered in connection with the doctrine of restraints on alienation.[3]

In England it is well settled that when one is entitled absolutely to property, any direction postponing its transfer or payment to him is void, on the ground that it is contrary to public policy that a man having the entire interest in property should be restrained in the use or disposition of it.[4] But an exception has been made in the case of married women, for whose benefit during coverture a restraint is allowed even upon an estate in fee simple.[5]

In many of the United States the strict English rule has been departed from, and restraints in the form of spendthrift trusts have been allowed.[6] The doctrine of the main case permitting a further restraint on alienation has not been widely accepted, but has become firmly established in Massachusetts [7] and Illinois,[8] and has been recognized in the federal courts.[9]

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[26] See WEBSTER'S DICTIONARY.

[27] This general principle of construction has been recognized in employers' liability insurance, as well as other branches. See Columbia, etc. Co. *v.* Fidelity and Casualty Co., *supra*, 167; Cornell *v.* Travelers' Ins. Co., 66 N. Y. App. Div. 559, 562. But the full argument advanced in the text above has not been mentioned in any case. The principal case merely followed the English decisions under the Workmen's Compensation Act, and in Columbia, etc. Co. *v.* Fidelity and Casualty Co., *supra*, the court intimated its disapproval of the accident insurance cases barring disease. See Columbia, etc. Co. *v.* Fidelity and Casualty Co., *supra*, 172, 173.

[1] 91 U. S. 716, 725.

[2] 149 Mass. 19.

[3] Armstrong *v.* Barber, 239 Ill. 389, 397.

[4] The rule is equally applicable whether the gift is to a natural person, Saunders *v.* Vautier, 4 Beav. 115; S. C. Cr. & Ph. 240; or a charity, Wharton *v.* Masterman, [1895] A. C. 186.

[5] Baggett *v.* Meux, 1 Phil. 627.

[6] See GRAY, RESTRAINTS ON ALIENATION, 2 ed., § 177 *a*.

[7] See Dunn *v.* Dobson, 198 Mass. 142, 146.

[8] Lunt *v.* Lunt, 108 Ill. 307; Wagner *v.* Wagner, 244 Ill. 101.

[9] Stier *v.* Nashville Trust Co., 158 Fed. 601 (*per* Lurton, J.). Some jurisdictions

Is the doctrine defensible on principle? It is clear that the testator's duly expressed intent to create this result must be carried out unless so doing would disregard some principle of law or public policy. The question then becomes: is there such a rule of policy interposed here? The whole tendency of the law has been toward the removal of old restraints on alienation, and the disallowance of new ones.[10] The only retrogressive movement has been the confirmation of spendthrift trusts, and these are opposed to the fundamental principle of the common law that it is against public policy that a man "should have an estate to live on but not an estate to pay debts with." [11] *Claflin* v. *Claflin* marks a second reactionary step; hence its supporters must justify its departure from the general rule. Where the doctrine has been adopted, the courts have admitted that the interest of the legatee remains alienable.[12] If a creditor or transferee of the *cestui's* interest is permitted to gain possession of the property forthwith, the restraint is purely formal, since the legatee can get possession by the simple process of assigning and accepting a reassignment. But if the restriction is strictly enforced, a disposition of the property at a fair valuation becomes more difficult, thus exposing the legatee to those one-sided bargains which the testator sought to prevent, and against which equity has always sought to protect *cestuis*.[13] It is admitted by advocates of the rule [14] that some limit must be placed upon the duration of the postponement, but no satisfactory limitation has as yet been evolved by the courts.[15] The adoption of any rule governing the duration will mark the introduction of a new confusing element into a branch of the law already overburdened with an inheritance of technicalities. It is submitted, therefore, that this exception, which neither affords any particular advantage, nor corrects a preëxisting defect in the law, but tends only to confusion, should be rejected.

CAN A STATE ABOLISH INSANITY AS A DEFENSE IN CRIMINAL PROSECUTIONS. — The Supreme Court of the State of Washington, in the recent case of *State* v. *Strasburg*, 110 Pac. 1020 (Wash.), answered this question in the negative. The case appears to be quite unprecedented. The decision held that the statute in question [1] violated the provisions of the state constitution that, (1) "No person shall be deprived of life, liberty, or property without due process of law," [2] and (2), "The right to trial by jury shall remain inviolate." [3]

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have statutory regulations preventing the adoption of the rule. See GRAY, RESTRAINTS ON ALIENATION, 2 ed., § 280.

[10] See GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 98; Edgerly *v.* Barker, 66 N. H. 434, 454.

[11] See Tillinghast *v.* Bradford, 5 R. I. 205, 212.

[12] Claflin *v.* Claflin, *supra*, 23.

[13] See GRAY, RESTRAINTS ON ALIENATION, 2 ed., § 124 *m*, *n*.

[14] See KALES, FUTURE INTERESTS, § 293.

[15] See 19 HARV. L. REV. 604; 20 *id.* 202; GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 121 *i*.

[1] REMMINGTON & BALLINGER'S CODE, (Wash.) § 2259.

[2] WASH. CONST., Art. I, § 3.

[3] WASH. CONST., Art. I, § 21. There are similar provisions in practically all state constitutions. See STIMSON, FEDERAL AND STATE CONSTITUTIONS, 170–172.

The exact confines of the power conferred upon the judiciary to curb legislative action because it denies someone due process of law, are even yet not exactly marked out. The phrase itself is incapable of precise definition,[4] and the decisions under it are not wholly consistent, the inconsistency being due in part to failure to distinguish "due process of law" from "equal protection of the laws." The same court that decided the *Union Transit* case [5] might well be willing to extend its power to cover this one. The phrase does not, however, restrict the machinery of the states to preëxisting institutions.[6] The cases incline toward the doctrine that the inhibition is directed toward arbitrary procedure in the course of the trial, rather than toward changes in the substantive law of crime.[7] Though courts must necessarily consider what is reasonable in defining "arbitrary procedure" and "equal protection of the laws," it does not follow that they may question the reasonableness of legislative enactments that apply uniformly to every person in the community, and violations of which are to be tried by a regular jury. The law in question is undoubtedly a great departure from previous criminal legislation and cannot be justified as "due process" on the ground of "ancientness." Yet after all, is it not the special province of the legislature to define crime? One queries whether the court has not inadvertently followed the erroneous doctrine first laid down in Coke's *dictum*,[8] but long since discredited,[9] that a court can nullify a statute merely because it seems to the court unjust, unreasonable, and oppressive.[10]

Of course the legislature did not really intend to abolish the defense altogether. It merely desired to prevent the abuse of it. Could that result be accomplished by giving the matter over to the exclusive consideration of the judge, or a lunacy commission? The answer must depend upon the question of the state's power to abolish it completely. Here we must notice the distinction between the trial of insanity merely as prefatory to commitment to an asylum, and the trial of the same question when set up in answer to a criminal charge. In the former case no jury is necessary.[11] In the latter the question of insanity is a

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[4] Davidson *v.* New Orleans, 96 U. S. 99.

[5] Union Transit Co. *v.* Ky., 199 U. S. 194. *Held*, unreasonable exercise of the taxing power to tax citizens on personalty permanently located outside the state. So too, it has been *held* an unreasonable exercise of the police power to prohibit the sale of liquor, so far as the act applied to liquor already existing within the state. Wynehamer *v.* The People, 13 N. Y. 378. See Mugler *v.* Kansas, 123 U. S. 623, 661, 678.

[6] Hurtado *v.* California, 110 U. S. 516.

[7] The test most frequently quoted is that laid down by Webster. See Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 581; COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW, 243, 244.

[8] 8 Rep. 118 a. Note to Paxton's Case, Quincy (Mass.), Appendix I, 520.

[9] See THAYER, CASES ON CONSTITUTIONAL LAW, 48, n.

[10] It is suggested that the law might have been attacked upon a ground not mentioned in the principal case, namely, that the infliction of the full penalty upon one incapable of comprehending the nature of his act is a punishment so shockingly excessive as to be both "cruel and unusual." WASH. CONST., Art. I, § 14. State *v.* Driver, 78 N. C. 423. See Weems *v.* United States, 217 U. S. 349. See 24 HARV. L. REV. 54. Practically all state constitutions contain this prohibition. See STIMSON, FEDERAL AND STATE CONSTITUTIONS, 181.

[11] But there must be a fair trial. Van Deusen *v.* Newcomer, 40 Mich. 90. State *v.* Billings, 55 Minn. 467. *In re* Boyet, 136 N. C. 415.

question of fact upon which the guilt or innocence of the accused depends. It is as much a question of fact as the question of his physical presence at the act itself. The right to trial by jury must imply the right to have the jury pass upon every question of fact material to the decision. Otherwise a hostile legislature might withdraw from their consideration one issue after another until the whole institution became reduced to a hollow shell.[12] The complete abolition of the defence would make the question of insanity wholly irrelevant. It might then be tried as an independent matter by any proper authority. But under the doctrine of the principal case that is not due process of law, and matters must stand practically as they now are.

MURDER OF THE INSURED BY THE BENEFICIARY. — The maxim that no man can take advantage of his own wrong does not in itself afford a complete answer to a murderer's contention that his crime ought not to affect his property rights.[1] Where a husband or wife, having murdered the other, has sought to take under the unconditional terms of the statutes relating to descent, dower and devises, the earlier cases frankly read exceptions into these statutes.[2] But the later decisions have made no exception and allow the murderer to take the legal title free from equities;[3] for the suggestion that a constructive trust arises in favor of the next in line of inheritance has not been adopted by the courts.[4]

But when the murderer has claimed as beneficiary of an insurance contract no difficulty has been felt in flatly refusing assistance.[5] For it is well recognized that the interest of a beneficiary is essentially equitable; that he is the *cestui que trust* of the insured, who holds the obligation of the insurer in trust for him.[6] Statutes and decisions that allow the beneficiary to sue in his own name do not change the essential characteristics of this relationship.[7] And since the beneficiary cannot come into court with clean hands, he is not entitled to relief. A recent Ohio case has properly refused to allow a recovery by the beneficiary. *Filmore* v. *Metropolitan Life Insurance Co.*, 92 N. E. 26 (Oh.). But the reasoning of the court is not conclusive, for it places its decision upon the ground

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[12] See BLACK, CONST. LAW, 2 ed., 519.

[1] Box *v.* Lanier, 2 Tenn. Ch. App. 1; Perry *v.* Strawbridge, 209 Mo. 621.

[2] Shellenberger *v.* Ransom, 47 N. W. 700 (Neb.); Riggs *v.* Palmer, 115 N. Y. 506 (devise). See 4 HARV. L. REV. 394; Perry *v.* Strawbridge, *supra* (a murderer of his wife is not a "widower" within the statute).

[3] Wellner *v.* Eckstein, 101 Minn. 444 (statutory dower); *In re* Carpenter's Estate, 170 Pa. St. 203; Owens *v.* Owens, 100 N. C. 240 (statutory dower — statute subsequently amended); Shellenberger *v.* Ransom, 50 N. W. 935 (Neb.); McAllister *v.* Fair, 72 Kan. 533; Kuhn *v.* Kuhn, 125 Ia. 440; Gollnik *v.* Mengel, 128 N. W. 292 (Minn.).

[4] Dean Ames advanced this view in 8 HARV. L. REV. 170. In Kuhn *v.* Kuhn, *supra*, it was passed upon by the court and rejected. A constructive trust arises only in favor of one who has suffered, the next in line of inheritance is seeking only a windfall.

[5] Schmidt *v.* Northern Life Association, 112 Ia. 41; New York Life Insurance Co. *v.* Davis, 96 Va. 737; Schreiner *v.* High Court C. O. of F., 35 Ill. App. 576.

[6] Cleaver *v.* Mutual Reserve Fund Ass., [1892] 1 Q. B. 147. This is the leading English case on this subject.

[7] The cases in which the contract is made directly between the insurer and the beneficiary upon the life of a third person are obviously not here considered.

that no loss has occurred under the terms of the policy, and quotes the words of Field, J., "As well might he recover insurance money upon a building that he had intentionally fired." [8] The analogy to fire insurance is unfortunate. The nature of life insurance is fundamentally different. In the former the payment is made only as an indemnity and upon the happening of an "accident." In the latter the contract is essentially an investment, a purchase by the insurance company of an annuity upon the life of the insured. The insurer contemplates a loss upon every policy, as is shown by its willingness to advance money upon its own policies as collateral security. The charges for the premiums are based upon exact mortality tables that have not excluded from their calculations death by suicide and murder.[9] Furthermore as a matter of practice it is the almost invariable custom of insurance companies to pay such losses, without contest, unless they have reason to suspect that policy was taken out with a view to the crime. For then the dispute is not as to a loss under a policy but whether a valid policy was ever issued.[10] But when there was no fraud in taking out the policy the fact that under its terms a loss has occurred is well shown by the decisions which allow the representative of the insured to recover on the policy.[11] Such a view met with approval in a recent North Carolina Case. *Anderson* v. *Life Insurance Co. of Va.*, 67 S. E. 53 (N. C.). In such a case the contract right of the insured against the company passes to the former's personal representative free from any equity in the beneficiary. Even those cases which say that, owing to the beneficiary's having had a direct right against the insurance company the representative's recovery must be in quasi-contract, effectually hold that there has been a loss, for the recovery is not the premiums paid but the face of the policy.[12]

TRANSFERS WITHIN THE RULE AGAINST CHAMPERTY AND MAINTENANCE. — Champerty and maintenance are usually found in transactions involving the giving of aid in a law suit. Such a case is *Van Gieson* v. *Magoon*, 20 Haw. 146, in which it was held, however, that an agreement by an attorney to defend a suit for a portion of the property in litigation is not illegal in Hawaii.[1]

The objection of champerty and maintenance is also frequently made to certain transfers of rights in property. Where a chattel is in the possession of an adverse claimant, the owner has nothing to transfer but a right of action or of recaption.[2] The assignment of this right is sometimes

[8] New York Mutual Life Insurance Co. *v.* Armstrong, 117 U. S. 591.

[9] See Lange *v.* Royal Highlanders, 110 N. W. 1110 (Neb.); ALEXANDER, THE LIFE INSURANCE COMPANY; 23 HARV. L. REV. 557.

[10] Prince of Wales, etc., Assn. *v.* Palmer, 25 Beav. 605; Conn. Mutual Life Insurance Co. *v.* Hillmon, 188 U. S. 208 (death, thirteen days after issue of policy); New York Mutual Life Insurance Co. *v.* Armstrong, *supra*, in which were spoken the words of Field, J., *supra*.

[11] Cleaver *v.* Mutual Reserve Fund Assn., *supra*; New York Life Insurance Co. *v.* Davis, *supra*; Supreme Lodge *v.* Menkhausen, 209 Ill. 277; Schonfield *v.* Turner, 75 Tex. 324.

[12] See 14 HARV. L. REV. 375.

[1] For a discussion of the law as to attorney's fees, see 18 HARV. L. REV. 222.

[2] Goodwyn *v.* Lloyd, 8 Port. (Ala.) 237; McGoon *v.* Ankeny, 11 Ill. 558. See 3

said to be champertous.[3] But this is probably just a survival of the old idea that the transfer of any chose in action is champertous,[4] for the transferee is allowed to sue in the name of the transferor to recover the chattel.[5] The assignment of the right to land adversely held was expressly forbidden by an old English statute.[6] This doctrine of maintenance has met with varying fortune in America.[7] In some states the rule is abolished by statute,[8] or is treated as obsolete by the courts; [9] in others it is established by statute [10] or by decisions.[11] In probably a majority of the states in which the rule prevails the grant is said to be void as to the adverse possessor but good against everyone else; [12] and the grantee, after suit in the name of the grantor to oust the adverse possessor, is protected by his deed.[13] This produces substantially the same result as the abolition of the rule. In any case the owner transfers really only a right of entry and there must be a suit or actual entry to oust the adverse possessor; whether this is done in the grantee's own name or in the name of the grantor is of no importance. It is also said rather indefinitely that the purchase of a mere right to sue will not be sustained.[14] And under this doctrine the right to have a conveyance set aside for fraud is commonly not assignable.[15]

Sometimes the ban of champerty or maintenance is urged against transfers of both things in possession and choses in action. For instance, under a New York statute modelled after an old English act it was held that the purchase of property from the owner in possession pending suit concerning it was void.[16] As the old English acts concerning champerty and maintenance are merely declaratory of the common law,[17] the same result might have been reached without that statute. But the cases now seem to hold such a transfer good.[18]

Confused with the preceding principle is the rule prohibiting an at-

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HARV. L. REV. 343. *Contra*, Tome *v.* Dubois, 6 Wall. (U. S.) 548. See The Brig Sarah Ann, 2 Sumn. (U. S.) 206, 211.

[3] McGoon *v.* Ankeny, *supra*.

[4] See 4 BLACKSTONE, COMMENTARIES, 135. Despite the prevalent idea as to the reason for the non-assignability of choses in action, scholars now seem agreed in believing it was not due to a fear of maintenance. See 2 L. QUAR. REV. 495; POLLOCK, CONTRACTS, 3 Am. ed. 278; 3 HARV. L. REV. 339.

[5] Stogdel *v.* Fugate, 2 A. K. Marsh. (Ky.) 136; Boynton *v.* Willard, 10 Pick. (Mass.) 166. And in jurisdictions where the real party in interest is the plaintiff of record, the assignee may sue for the property in his own name. Doering *v.* Kenamore, 86 Mo. 588.

[6] 32 H. 8, c. 9. This was practically repealed by 8 & 9 Vict. c. 106.

[7] See 1 STIMSON, AMER. STAT. LAW, § 1401; DEMBITZ, LAND TITLES, § 60.

[8] MASS. REV. LAWS, [1902] 1222; McLoud *v.* Mackie, 175 Mass. 355.

[9] Campbell *v.* Everts, 47 Tex. 102.

[10] GEN. STAT. CONN., [1902] § 4042; Paton *v.* Robinson, 81 Conn. 547.

[11] Campbell *v.* Point Street Iron Wks., 12 R. I. 452.

[12] McMahan *v.* Bowe, 114 Mass. 140. See Stringfellow *v.* Tenn. Coal, Iron & R.R. Co., 117 Ala. 250.

[13] Key *v.* Snow, 90 Tenn. 663; Coogler *v.* Rogers, 25 Fla. 853.

[14] Hinchman *v.* Kelley, 49 Fed. 492.

[15] Brush *v.* Sweet, 38 Mich. 574; Whitney *v.* Kelley, 94 Cal. 146. But *cf.* Dickinson *v.* Burrell, L. R. 1 Eq. 337.

[16] Jackson *v.* Ketchum, 8 Johns. (N. Y.) 479.

[17] Wallis *v.* Duke of Portland, 3 Ves. 494. See Partridge *v.* Strange, Plowd. 77, 88. But see Schomp *v.* Schenck, 40 N. J. L. 195, 205.

[18] Camp *v.* Forrest, 13 Ala. 114; Frazier *v.* Harris, 51 Ind. 156; O'Driscoll *v.* Doyle, 31 Colo. 193.

torney from purchasing even outright from his client the subject-matter of a suit which the attorney is conducting.[19] Only a right of action was transferred in all the cases found, with possibly one exception,[20] but the language used and in some instances the reasons given apply equally to the transfer of a thing in possession.

From the jumble of cases it is difficult to deduce fixed rules as to what transfers are to-day forbidden. The common-law doctrines have to a large extent become obsolete [21] and ideas of public policy [22] instead of hard and fast rules are employed to determine what transactions are obnoxious.[23] "The present legal doctrine of maintenance is due to an attempt on the part of the Courts to carve out of the old law such remnant as is in consonance with our modern notions of public policy." [24]

WHAT IS COMMERCE. — Much of the difficulty in the interpretation of the interstate commerce clause of the federal Constitution has been due to the uncertainty of the meaning of the word "commerce." The dictionary definition is "an interchange of goods, merchandise, or property of any kind." [1] Yet it has always been clear that the term, as used in the Constitution, was intended to have a broader scope. Marshall, C. J., laid down the much-repeated maxim that "commerce is intercourse." [2] Every contract would be included in this definition, but it is uncontroverted that a mere contract made between citizens of different states is not in itself interstate commerce.[3] Therefore the adoption of this term is of little assistance for the question merely becomes, what intercourse is included.

Prior to the adoption of the Constitution the states imposed different import and export duties, resulting in vexatious regulations and restrictions. Hence in giving Congress power to regulate interstate commerce it would seem clear that the evil sought to be remedied was the interference by a state with the free movement of goods or of individuals. It was early settled that the transportation of individuals into a state is commerce.[4] It is also settled that the transportation of goods from one

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[19] Simpson *v.* Lamb, 7 E. & B. 84; West *v.* Raymond, 21 Ind. 305; Miles *v.* Mut. Reserve Fund Life Ass'n., 108 Wis. 421. Some courts have permitted such a purchase subject to the usual close examination for fraud or unfairness given any transaction between attorney and client. Myers *v.* Luzerne County, 124 Fed. 436. See Dunn *v.* Record, 63 Me. 17, 19. And an attorney may take an assignment of such property as security for services rendered in the suit. Anderson *v.* Radcliffe, E. B. & E. 806. *Cf.* Mott *v.* Harrington, 12 Vt. 199.

[20] Rogers *v.* R. E. Lee Mining Co., 9 Fed. 721.

[21] See Casserleigh *v.* Wood, 14 Colo. App. 265, 270.

[22] It is now recognized that the law against champerty and maintenance is designed to prevent unnecessary litigation and the trafficking in quarrels. See Miles *v.* Mut. Reserve Fund Life Ass'n., *supra*.

[23] See Casserleigh *v.* Wood, *supra*; Fischer *v.* Kamala Naicker, 8 Moo. Ind. App. 170, 187; POLLOCK, CONTRACTS, 3 Am. ed. 460.

[24] Brit. C. & P. Conveyors, Lim. *v.* Lamson Store Service Co., Ld., [1908] 1 K. B. 1006, 1013.

[1] See CENTURY DICTIONARY.

[2] Gibbons *v.* Ogden, 9 Wheat. (U. S.) 189.

[3] Paul *v.* Virginia, 8 Wall. (U. S.) 168.

[4] Gibbons *v.* Ogden, *supra;* Passenger Cases, 7 How. (U. S.) 283.

state to another constitutes commerce whether or not in connection with a sale of the goods transported.[5] On the other hand the mere effecting of a sale, where the introduction of the property sold is not necessarily involved, is not within the term.[6] But intervening acts, such as solicitations of a drummer, which are instrumental in bringing about the introduction of property, are themselves subject to regulation as commerce.[7] Thus the decisions lead to the general conclusion that a commercial transaction, in the constitutional sense, is one whose object is to effect the transportation of persons or property.

Until recently courts asserted that what is transmitted must be an ordinary subject of traffic having in itself a recognized money value.[8] To-day, however, the transmission of intelligence is held to be commerce.[9] Telegraphic and telephonic communications are thus brought within this category, though such companies can be subjected to the commerce clause on the ground of being adjuncts of commerce.[10]

The question arises how far a transaction will be regarded as interstate commerce simply because it incidentally involves the transportation of property. Doing insurance business in a foreign state has consistently been held not to be interstate commerce.[11] Although incidentally the insurance policy will be sent from another state the gist of the transaction is not the transmission of property, but indemnity in case of loss. Thus a commission broker telegraphing orders to another state, in which the goods were to remain, has been held not to be engaged in interstate commerce, the mode of his effecting sales being purely incidental.[12] In a recent case, *Imperial Curtain Co.* v. *Jacob*, 127 N. W. 772 (Mich.), a foreign corporation contracted with a resident of Michigan to exhibit in Michigan a sign bearing an advertisement of the latter's business. Though there was involved the sending of the sign from the foreign state to the place of exhibition the transaction was held not to be interstate commerce. This class of decisions has been criticised.[13] Yet they seem sound when the conditions which the Constitution sought to remedy are considered. It is doubtful whether, in desiring the transmission of property to be unrestricted by the separate states, it was intended to hamper the states to the extent of preventing them from regulating transactions which in a purely incidental way involved interstate shipments.

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[5] The language in the early cases would seem to confine commercial shipments to those involving sales. See State Freight Cases, 15 Wall. (U. S.) 232. Yet later decisions show that a sale is not essential. Butler Bros. Shoe Co. *v.* United States Rubber Co., 156 Fed. 1 (consignment of goods to a factor).

[6] Ware and Leland *v.* Mobile County, 209 U. S. 405.

[7] Robbins *v.* Shelby Taxing District, 120 U. S. 489; McCall *v.* California, 136 U. S. 104.

[8] Lottery Cases, 188 U. S. 321.

[9] International Text Book Co. *v.* Pigg, 217 U. S. 91 (a correspondence school doing business in different states was held to be engaged in interstate commerce). See 23 HARV. L. REV. 644.

[10] Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1; Muskogee Nat. Tel. Co. *v.* Hall, 118 Fed. 382.

[11] Paul *v.* Virginia, *supra*. On principle it would seem proper for Congress to regulate companies engaged in marine insurance and also those insuring goods which are shipped between the states, on the ground that such insurance is an adjunct of commerce. But the law is otherwise. Hooper *v.* California, 155 U. S. 648.

[12] Ware and Leland *v.* Mobile County, *supra*.

[13] See 39 AM. LAW REV. 181; COOKE, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, § 7.

RECENT CASES.

ADVERSE POSSESSION — WHAT CONSTITUTES — EXCLUSIVE POSSESSION. — The defendant had cultivated as his own, for over twenty years, a strip of land belonging to the plaintiff, beneath the plaintiff's eaves. The plaintiff sued the defendant for building a walk on this strip. *Held*, that the defendant has acquired the fee in the strip by adverse possession, subject to an easement in the plaintiff to let his eaves hang over it. *Rooney* v. *Petry*, 17 Ont. Wk. Rep. 83.

To gain title by adverse possession the adverse possessor must have exclusive possession: he must be in and the true owner must be out. *Bellis* v. *Bellis*, 122 Mass. 414. If the true owner is making such use of his land as at least to reserve in himself an easement over it, and that use is, as here, the one which a true owner would naturally make of that land, it seems strange to say that another can, during all that period of use, be in exclusive possession. To build a shed with overhanging eaves has been regarded as such a taking of the land underneath the eaves as will found a claim by prior possession to that land against one who later put it under cultivation. *Thacker* v. *Guardenier*, 7 Met. (Mass.) 484. In Wisconsin it has been squarely decided that overhanging eaves give the owner such possession of the land beneath them as to prevent exclusive possession in another. *Lins* v. *Seefeld*, 126 Wis. 610. *Contra*, *Randall* v. *Sanderson*, 111 Mass. 114. The Wisconsin view seems the fairer and more logical one.

ADVERSE POSSESSION — WHAT CONSTITUTES — WHETHER CONSCIOUS HOSTILITY IS ESSENTIAL. — The plaintiff claimed and occupied land for the statutory period up to what he believed to be the line mentioned in his deed. By mistake his claim went beyond the true line. *Held*, that since the plaintiff had no intention of claiming land which did not belong to him, he acquired no title by adverse possession. *Clinchfield Coal Co.* v. *Viers*, 68 S. E. 976 (Va.).

In general the statutes of limitations merely bar the owner's remedy and are silent as to the nature of the holding which suffices to accomplish it. From the analogy to disseisin, however, the courts early established the rule that the stranger's possession must be under claim of title. But neither this analogy nor the words of the statute justify the further requirement that such claim must be consciously hostile to the true owner. It is settled that when the defendant's claim to the entire tract which he has occupied rests upon adverse possession, conscious hostility is not necessary. *Sumner* v. *Stevens*, 6 Met. (Mass.) 337; *Nowlin* v. *Reynolds*, 25 Gratt. (Va.) 137. But where the defendant has good paper title to a part of the land occupied, and title by adverse possession is relied upon merely to extend the boundaries of his claim, many cases hold that he must occupy the additional strip in conscious hostility to the true owner. *Grube* v. *Wells*, 34 Ia. 148; *McCabe* v. *Bruere*, 153 Mo. 1. This doctrine seems, however, to be without logical or historical foundation, and puts a premium on bad faith. The weight of authority is against it. *French* v. *Pearce*, 8 Conn. 439; *Daily* v. *Boudreau*, 231 Ill. 228; *Mielke* v. *Dodge*, 135 Wis. 388.

AGENCY — PRINCIPAL'S LIABILITY TO THIRD PERSONS IN TORT — LIABILITY OF CHARITABLE ORGANIZATION. — The plaintiff, while engaged in making repairs on the premises of the Salvation Army, was injured by the negligence of the agents of the charity. *Held*, that the charity is liable. *Hordern* v. *Salvation Army*, 92 N. E. 626 (N. Y.).

American authorities are practically unanimous in granting some exemption to charities. But charities in England would seem to be liable for the torts of their agents. The early reasoning for exemption from liability was that trust

funds should not be diverted to paying damages. *Parks* v. *Northwestern University*, 218 Ill. 381. This has been repudiated in England. *Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. 93; *Gilbert* v. *Trinity House*, 17 Q. B. D. 795. And it is not logically tenable in those American jurisdictions which allow recovery where there has been negligence in selecting incompetent servants. See *Plant System Relief & Hospital Department* v. *Dickerson*, 118 Ga. 647. A second view, that in the case of charities none of the reasons of public policy underlying the rule of *respondeat superior* are applicable, is supported by reasoning which is not unassailable. *Hearns* v. *Waterbury Hospital*, 66 Conn. 98. A third theory, illustrated by the principal case, and now the established doctrine in New York, that a recipient of charity cannot invoke the rule because he has assumed the risk, but that an outsider may, is of comparatively recent growth. *Powers* v. *Massachusetts Homœopathic Hospital*, 101 Fed. 896; *ibid.*, 109 Fed. 294; *Bruce* v. *Central M. E. Church*, 147 Mich. 230; *Wallace* v. *Casey Co.*, 132 N. Y. App. Div. 35. The reasons against such a theory seem as strong as those against the fellow-servant doctrine. Moreover it establishes as a presumption of law what is at best a doubtful question of fact.

AGENCY — UNDISCLOSED PRINCIPAL'S RIGHTS AND LIABILITIES WITH RESPECT TO THIRD PERSONS — VIOLATION OF INSTRUCTIONS. — The plaintiff sold whisky to the manager of the defendants' hotel, dealing with the manager as owner. The defendants had instructed the manager to buy whisky from another firm exclusively. On discovering that the defendants were the real principals, suit was brought against them for the price of the whisky. *Held*, that the plaintiffs can recover. *Kinahan & Co., Ltd.* v. *Parry*, [1910] 2 K. B. 389.

For a discussion of the principles involved, see 23 HARV. L REV. 599.

CARRIERS — BAGGAGE — EXCLUSION FROM STREET CAR FOR CARRYING ARTICLE NOT INTENDED FOR PERSONAL USE. — The plaintiff attempted to board the defendant's car while carrying five cents' worth of ice, which he was taking to a sick man. There was a regulation excluding "bulky and dangerous articles" from the cars, but the jury found that the ice was carefully wrapped and not leaking. The plaintiff was, however, excluded, for which this action was brought. *Held*, that the court cannot say as a matter of law that the ice was not personal baggage. *McIntosh* v. *Augusta & Aiken R. Co.*, 69 S. E. 159 (S. C.).

Articles carried by a passenger for the use of another person are not baggage. *Metz* v. *California Southern R. Co.*, 85 Cal. 329. And this is a question of law. *Connolly* v. *Warren*, 106 Mass. 146. The case thus seems wrong on the ground of its decision. If, however, a company does by usage permit passengers to carry small packages of merchandise, a man may not be excluded for so doing. *Runyan* v. *Central R. Co. of New Jersey*, 65 N. J. L. 228. And it would seem that, in the case of street cars, a court might well judicially recognize the existence of such a usage, so general as to have become a part of the carrier's undertaking, in the absence of an express regulation to the contrary.

CARRIERS — DUTY TO ACCEPT AND CARRY PASSENGERS — RIGHT TO COMPEL CAR TO RETURN TO DESIGNATED STOPPING PLACE. — The plaintiff signalled the defendant's car at one of its regular stops, but the car ran by seventy-five yards, and the motorman refused to bring it back to the stop. The plaintiff refused to walk to the car, though allowed time to do so, and brought this action for the damages suffered by being left behind. *Held*, that he may recover. *Christian* v. *Augusta & Aiken R. Co.*, 69 S. E. 17 (S. C.).

It has been held that a regulation of an electric railway company not to return to take up a passenger may, under circumstances stronger indeed than those in the principal case, be unreasonable. *Jackson Electric Railway, Light,*

& Power Co. v. *Lowry*, 79 Miss. 431. And a railroad is liable for the damage resulting from its refusal, without valid excuse, to carry a passenger back, after wrongfully over-shooting his station. *Samuels* v. *Richmond & Danville R. Co.*, 35 S. C. 493; *Fordyce* v. *Dillingham*, 23 S. W. 550 (Tex.). The company's legal duty is undoubtedly to take up passengers at its regularly designated stops, and if it does not substantially comply with that duty, it seems that only important considerations of public convenience should excuse a refusal to bring the car back. Such considerations would obviously arise where cars run frequently through crowded streets, and going backward would materially add to danger of collisions.

CHAMPERTY AND MAINTENANCE — ATTORNEY PAID OUT OF FRUITS OF LITIGATION. — An attorney agreed to defend a pending suit in return for a portion of the property in litigation. *Held*, that the agreement is not illegal. *Van Gieson* v. *Magoon*, 20 Haw. 146. See NOTES, p. 228.

CONFLICT OF LAWS — PERSONAL JURISDICTION — AGREEMENT TO MORTGAGE FOREIGN LAND. — The defendant company agreed to purchase the plaintiff company's mortgage debenture bonds constituting a floating charge on property in Northern and Southern Rhodesia and in England. The plaintiff contracted to give the defendant an exclusive license, renewable every five years in perpetuity, to work the plaintiff's diamondiferous land. This agreement was made in London, where interest and principal were payable. Northern Rhodesia is under English, Southern Rhodesia under Roman-Dutch law. The bonds were issued and later paid, but were never registered, as required by the Rhodesian law. Subsequently the plaintiff brought this bill for a declaration upon the validity of the license agreement. *Held*, that the license clause is invalid. *British South Africa Co.* v. *De Beers Consolidated Mines Limited*, 103 L. T. Rep. 4 (Eng., Ct. App., July 5, 1910).

The English rule is that the validity of a contract is determined by the law the parties intend shall govern. *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202. But see 23 HARV. L. REV. 1–11, 79–103, 194–208, and 260–292. All courts, however, hold that the creation of interests in land is governed by the *lex situs*. *Kerr* v. *Moon*, 9 Wheat. (U. S.) 565. See 20 HARV. L. REV. 382. Hence it was contended in the principal case that so far as the contract related to land in Southern Rhodesia the Roman-Dutch law applied, and that under this law the agreement to lease, given to secure the bonds, would continue in force after the bonds were paid. But the court, relying upon earlier cases, considered that in its exercise of jurisdiction *in personam* it could enforce the equities of the English mortgage law. *Ex parte Pollard*, Mont. & C. 239; *Lord Cranstown* v. *Johnston*, 3 Ves. Jr. 170. Under that law such a clog on the equity of redemption is not allowed. *Noakes & Co.* v. *Rice*, [1902] A. C. 24. The cases relied upon by the court would abundantly warrant the present decree in a case involving an actual interest in land in Southern Rhodesia. See *Ex parte Pollard*, *supra*, 251. But the same result would seem possible without their aid. Through lack of registration no interest or security in Rhodesian land was obtained. See 2 NATHAN, COMMON LAW OF SOUTH AFRICA, 924. Hence the *lex situs* does not enter and only English law, with reference to which the parties contracted, can apply.

CONFLICT OF LAWS — PERSONAL JURISDICTION — JURISDICTION TO ORDER PAYMENT OF ALIMONY. — Suit was brought for a divorce and alimony. The defendant appeared and answered. A divorce was granted, and by agreement of counsel the court decreed that such alimony should be paid as it should thereafter direct, upon the application of any of the parties in interest. The defendant left the jurisdiction, and the court, upon notice being served to the

defendant's attorney of record, thereafter made an order for the payment of alimony. *Held*, that it has power to do so. *McSherry* v. *McSherry*, 77 Atl. 653 (Md.).

Although a divorce may be granted *ex parte* at the domicile of one of the parties, a decree for alimony, being *in personam*, is of no effect unless the court has personal jurisdiction of the defendant. *Prosser* v. *Warner*, 47 Vt. 667. Similarly, a court which grants a divorce cannot enjoin the defendant unless he is within its jurisdiction. See *De la Montanya* v. *De la Montanya*, 112 Cal. 101. *Contra*, *Kempson* v. *Kempson*, 63 N. J. Eq. 783. But if personal jurisdiction is once acquired, it is retained for the purpose of settling all questions involved in that suit, including the determination of a writ of error. *Fitzsimmons* v. *Johnson*, 90 Tenn. 416. Thus a court which has properly made an order for the payment of alimony may retain the power to modify it. *Galusha* v. *Galusha*, 138 N. Y. 272; *Olney* v. *Watts*, 43 Oh. St. 499. The decision in the principal case, therefore, seems sound. For a discussion of similar jurisdictional questions involved in awarding the custody of children, see 24 HARV. L. REV. 142.

CONSTITUTIONAL LAW — PERSONAL RIGHTS OF THE INDIVIDUAL — CAN A STATE ABOLISH INSANITY AS A DEFENSE IN CRIMINAL ACTIONS. — A statute provided that insanity should be no defense in criminal actions, but that the presiding judge might, at his discretion, commit to an insane asylum any person convicted, who in his opinion was insane. The state constitution provided that, "No person shall be deprived of life, liberty, or property without due process of law," and that, "The right to trial by jury shall remain inviolate." *Held*, the statute in question violated both the above provisions. *State v. Strasburg*, 110 Pac. 1020 (Wash.) See NOTES, p. 225.

CONSTITUTIONAL LAW — POWERS OF CONGRESS: IMPLIED POWERS — FORBIDDING INTERSTATE TRANSPORTATION OF PRODUCTS UNDER PURE FOOD LAW. — The United States brought a libel for forfeiture of goods under the Pure Food Law. A demurrer was filed on the ground that the statute was unconstitutional. *Held*, that the statute is constitutional. *United States* v. *Seventy-four Cases of Grape Juice*, 181 Fed. 629 (Dist. Ct., W. D. N. Y.).

The plaintiff sought to enjoin certain government officials from seizing its goods in interstate shipments, under the Pure Food Law, on the ground that the act was unconstitutional. *Held*, that the statute is constitutional. *Shawnee Milling Co.* v. *Temple*, 179 Fed. 517 (Circ. Ct., S. D. Ia.).

Interstate commerce is defined as intercourse and traffic among the states, including navigation and the transportation of persons and property, as well as the purchase, sale, and exchange of commodities. *County of Mobile* v. *Kimball*, 102 U. S. 691. Goods in the process of interstate shipment, therefore, are subject to whatever regulations Congress may impose in the proper exercise of its control over interstate commerce. See *Gibbons* v. *Ogden*, 9 Wheat. (U. S.) 1. But the purpose of the Pure Food Law was clearly the protection of the public health and not the regulation of commerce as such. A statute must be judged by its real purpose and not its incidental one. See *Minnesota* v. *Barber*, 136 U. S. 313. Since the protection of the public health is an exercise of police power, which, not being expressly given to the national government, is supposed to reside in the states, at first blush the statute would seem to be unconstitutional. But the national government as incidental to the regulation of commerce can exercise the police power and regulate commerce so as to protect the national health. See *Lottery Case*, 188 U. S. 321, 357; COOLEY, CONST. LIM. 723. But see 23 HARV. L. REV. 441, 445, *et seq.* Hence the statute is constitutional; but the case is interesting as showing how far the courts have departed from the real meaning of the commerce clause. See *Veazie* v. *Moor*, 14 How. (U. S.) 568, 574.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — CONSTITUTIONALITY OF INDETERMINATE SENTENCE ACTS. — The defendant was convicted under a statute providing that for certain crimes the court should not sentence the prisoner to a definite term, but that he should serve not less than one year, nor more than the maximum penalty for that crime. A board of pardons was empowered to advise the governor to pardon the prisoner at any time after the minimum term had been served. *Held*, that this statute is constitutional. *People* v. *Joyce*, 92 N. E. 607 (Ill.).

It is urged against the constitutionality of such statutes that they interfere with the powers of the judiciary by depriving the courts of the right to fix the exact punishment, and conferring this right on a board which is not judicial. *People* v. *Cummings*, 88 Mich. 249; *In re Conditional Discharge of Convicts*, 73 Vt. 414. But the legislature may set an exact penalty for any crime, and here it has set the maximum period, for which the courts are to sentence the defendant. *People ex rel. Clark* v. *The Warden of Sing Sing Prison*, 39 N. Y. Misc. 113; *State* v. *Duff*, 122 N. W. 829 (Ia.). The board is merely an agency empowered to pardon the prisoner at an earlier date, a privilege always allowed to some body other than the courts. As the governor is free to refuse a pardon, or to pardon on his own initiative, his constitutional rights are not infringed. *Rich* v. *Chamberlain*, 104 Mich. 436. *Cf. State ex rel. Bishop* v. *State Board of Corrections*, 16 Utah, 478. The great objection to these statutes is that the court which tried the case is better prepared to exercise clemency, if that is desirable, than a board dependent mainly on hearsay evidence. *People* v. *Cummings*, *supra*. But this is an argument to be addressed to the legislature. By the decided weight of authority such statutes are held to be constitutional. *George* v. *People*, 167 Ill. 447; *Miller* v. *State*, 149 Ind. 607.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — FEDERAL POWERS OF STATE "LEGISLATURE." — The constitution of South Dakota, Art. III, § 1, provided that five per cent of the voters could "require that any laws which the legislature may have enacted shall be submitted to a vote of the electors . . . before going into effect." The state legislature passed a statute establishing Congressional districts. A referendum petition was filed as to that act. The relator sought to have his nomination papers filed under the act. *Held*, that he is not entitled to do so since the act is not in force. *State ex rel. Schrader* v. *Polley*, 127 N. W. 848 (S. D.). See NOTES, p. 220.

CORPORATIONS — NATURE OF CORPORATION — LICENSE TO ASSIGN LEASE TO A "RESPECTABLE AND RESPONSIBLE PERSON." — A lease of a livery stable contained a covenant not to assign without the lessor's consent; but such consent was not to be withheld in respect of "a respectable and responsible person." Permission to assign to a corporation was asked and refused; but the assignment was made. In an action brought by the lessor to have the lease declared forfeited, the question was whether a corporation could be within the description in the lease. *Held*, that a corporation may be "a respectable and responsible person." *Willmott* v. *London Road Car Co.*, 45 L. J. 666 (Eng., Ct. App., Oct. 13, 1910).

In legal meaning, the term "person" usually embraces corporations. As used in the Fourteenth Amendment it is so construed. See *Pembina Consolidated Silver Mining and Milling Co.* v. *Pennsylvania*, 125 U. S. 181. Unless a contrary intention on the part of the legislature appears, statutes receive this construction. See *Pharmaceutical Society* v. *London and Provincial Supply Association*, 5 App. Cas. 857, 869. So in a will a power to lease "to any person" covers a letting to a corporation. *In re Jeffcock's Trusts*, 51 L. J. Ch. 507. The question then becomes whether a corporation may be described as "respectable." The adjective invariably derives significance from the context. The

lease here demands a respectable liveryman — that is, one who carries on the trade in a respectable manner. Obviously a corporation may do so. A corporation has been held to have a "trading character," a "reputation in the way of its business," for a libel upon which it may recover. *South Hetton Coal Company* v. *North-Eastern News Association*, [1894] 1 Q. B. 133. Also a corporation may be "responsible," that is, financially sound; in this case, able to pay the rental. The decision is clearly correct and, in view of the constantly increasing use of the corporate form, in thorough accord with modern business conditions.

CORPORATIONS — STOCKHOLDERS: INDIVIDUAL LIABILITY TO CORPORATION AND CREDITORS — WHAT LAW GOVERNS. — A California statute provided that the stockholders in a domestic corporation or in a foreign corporation doing business within the state shall be liable, in certain proportions, for the corporate debts. An Arizona statute provided that a corporation formed under its laws may exempt the private property of its members from liability for corporate debts. The defendant was a stockholder in a corporation formed in Arizona to do part of its business in California, and whose articles of incorporation expressly exempted the private property of its members from liability for corporate debts. The corporation did business in California, and became insolvent. *Held*, that the defendant is liable for his proportionate share of the debts of the corporation, according to the law of California. *Thomas* v. *Wentworth Hotel Co.*, 110 Pac. 942 (Cal.).

The liability of stockholders is contractual, and therefore depends on the law of the place of incorporation. *Young* v. *Farwell*, 139 Ill. 326; *Tompkins* v. *Blakey*, 70 N. H. 584. See BEALE, FOREIGN CORPORATIONS, § 442. Statutes fixing the liability of stockholders are to be understood as not applying to foreign corporations unless that is their clearly expressed intent. See MORAWETZ, PRIVATE CORPORATIONS, § 874. But it is submitted that a state has no power to increase the liability of stockholders in a foreign corporation except by reincorporating it. *Risdon Iron & Locomotive Works* v. *Furness*, 21 T. L. R. 179. The principal case carries to an extreme the doctrine announced in a decision of the Supreme Court of the United States, in which it was held that since the corporation was formed to do business in California, and the articles of incorporation contained no express declaration as to the liability of stockholders, the incorporators must be presumed to have intended that their liability should be governed by the law of California. *Pinney* v. *Nelson*, 183 U. S. 144. For a criticism of that decision and a more complete discussion of the subject, see 18 HARV. L. REV. 452.

COVENANTS OF TITLE — COVENANTS AGAINST INCUMBRANCES — EASEMENTS. — In a deed of land given by the defendant to the plaintiff, the covenants of warranty were so worded that they might be taken, under the Florida statutes, to include a covenant against incumbrances. At the time of the sale a railroad maintained an open and notorious right of way across the land. The plaintiff sought to recover for breach of the covenant. *Held*, that he cannot recover. *Van Ness* v. *Royal Phosphate Co.*, 53 So. 381 (Fla.).

In addition to mortgages and other burdens upon the title, a covenant against incumbrances of course embraces easements. *Memmert* v. *McKeen*, 112 Pa. St. 315. But to determine what easements are included in the covenant, the courts have rightly looked in each case to the intention of the parties, and have not felt bound to give the written words their literal meaning, which would cover every sort of incumbrance. No case has been found which has held the presence of a public sidewalk to be a breach of the covenant. In drawing the line the courts have adopted various criteria. Some courts have felt that the words of the parties should be strictly construed. *Barlow* v.

McKinley, 24 Ia. 69. Others have said that the vendee's notice of the easement is enough to exclude it from the covenant. *Desvergers* v. *Willis*, 56 Ga. 515. And others hold that the open and public way in which the easement is evidenced places a duty upon the vendee to take notice. *Patterson* v. *Arthurs*, 9 Watts (Pa.) 152.

DAMAGES — EXCESSIVE DAMAGES — LATITUDE ALLOWED TO "NOMINAL DAMAGES." — In an action for failure to transmit a telegram, the court restricted the plaintiff to the recovery of nominal damages. The jury returned a verdict for $250. The defendant moved for a new trial on the ground that the amount was excessive. *Held*, that the motion be denied. *Western Union Telegraph Co.* v. *Glenn*, 68 S. E. 881 (Ga., Ct. App.).

In this case, though accepting the definition that nominal damages are a trivial sum, the court adopts the reasoning of an earlier Georgia decision, that the term is purely relative, depending "upon the vastness of the amount involved." *Sellers* v. *Mann*, 113 Ga. 643. Properly speaking the only sum involved is that which the plaintiff can recover, which in this case is nominal damages, and so the court's theory reduces itself to an absurdity. If, however, the theory is that the term is relative to the amount claimed, it is equally unsound. That the amount of the claim bears no relation to the damages is shown by two types of cases. The plaintiff may recover nominal damages where no actual damage has occurred to give rise to any claim. *Grau* v. *Grau*, 37 Ind. App. 635. And where not only no damage is claimed, but the plaintiff has benefited by the wrong, exactly the same recovery is had. *Excelsior Needle Co.* v. *Smith*, 61 Conn. 56. It makes no difference whether the plaintiff claims much or little, if his right to damages rests only on a technical cause of action.

EXEMPTIONS — MORTGAGE OF FUTURE EXEMPT GOODS. — A, a resident of Michigan, assigned as security to B all his goods which were then or might be thereafter exempt from levy and sale on execution, and authorized B to demand and select the same. *Held*, that B's claim should be allowed against A's assignee in bankruptcy. *In re Hastings*, 24 Am. B. Rep. 360 (C. C. A., 6th Circ.).

The true policy of the exemption laws would seem to forbid an assignment of a right so personal in its nature. A few cases sustain this principle. *Howland* v. *Fuller*, 8 Minn. 50; *Lane* v. *Richardson*, 104 N. C. 642. On principle, too, the mortgaging of after-acquired property should not give a right good against third parties. See 19 HARV. L. REV. 557. But the court in the principal case was bound on these points by the decisions of the Michigan courts. *Wilson* v. *Perrin*, 62 Fed. 629. By those decisions a mortgagee of exempt property is entitled to it as against creditors. *Buckley* v. *Wheeler*, 52 Mich. 1. And the law of Michigan recognizes the validity of chattel mortgages comprising after-acquired property. *Louden* v. *Vinton*, 108 Mich. 313. These propositions, however, do not necessarily involve the conclusion drawn from them by the court, — that a mortgage is valid which comprises all the exempt property which the mortgagor may acquire in future. Such an extension of a principle of dubious expediency might well have been avoided on grounds of policy similar to those which render ineffectual an assignment of wages to be earned under a contract not yet made. *Herbert* v. *Bronson*, 125 Mass. 475.

HIGHWAYS — REGULATION AND USE — MOVING A HOUSE. — The defendant procured a license from a municipality to move a house through the streets. The plaintiff operated a street railway under a franchise giving it the right to maintain poles and wires. The defendant in moving would interfere with the plaintiff's wires. The plaintiff asked for an injunction restraining the defend-

ant from such interference. *Held*, that no injunction should be granted. *Western N. Y. & P. T. Co.* v. *Stillman*, 68 N. Y. Misc. 456.

Recognizing the fact that moving a house differs only in degree from moving anything else, a reasonable use of the highway for such purpose has generally been held to be lawful. *Graves* v. *Shattuck*, 35 N. H. 257. *Contra*, *Dickson* v. *Kewanee Elec. Light Co.*, 53 Ill. App. 379. It is usual for cities to require a license for the moving of a building. This does not take away the common-law right; it restricts it to those who have satisfied the authorities that their exercise of it will not create a public nuisance. *Hinman* v. *Clarke*, 121 N. Y. App. Div. 105. A street railway franchise does not give an exclusive right to use the streets or any part of them; the company must share them with the public. *Market St. Ry. Co.* v. *Central Ry. Co.*, 51 Cal. 583. It follows that the company, like the public, is subject to occasional reasonable interference with its enjoyment of the streets. As the defendant in the principal case proposed to exercise his right in a way which would not work irreparable harm to the plaintiff, and as the plaintiff's right by franchise was not superior to the defendant's common-law right, the suit of the plaintiff was rightly denied.

INJUNCTIONS — ACTS RESTRAINED — PAYMENT OF SALARY TO ONE ILLEGALLY APPOINTED TO OFFICE. — The defendant was illegally appointed judge by a city council. The plaintiff, a taxpayer, joining the city council as co-defendant, prayed for an injunction restraining the payment of salary to the defendant. *Held*, that the injunction be granted. *Forman* v. *Bostwick*, 139 N. Y. App. Div. 333.

A court of equity has no jurisdiction to determine a question of title to office, since there is an adequate remedy by *quo warranto* proceedings. If there is an independent ground of equity jurisdiction, however, the court will determine the whole matter in issue, even if a question of title is incidentally involved. *Cf. Johnston* v. *Jones*, 23 N. J. Eq. 216. One recognized head of equity jurisdiction is the prevention, at the suit of a taxpayer, of an illegal waste of public moneys. *Merrill* v. *Plainfield*, 45 N. H. 126. But the principal case cannot be supported on that ground. *Burgess* v. *Davis*, 138 Ill. 578. Even where there is a rightful claimant who has been kept out of office by the *de facto* officer, he cannot recover from the city the salary which has been paid under mistake to the actual incumbent. *Coughlin* v. *McElroy*, 74 Conn. 397. Hence there is no waste of public money. The court in the principal case lays emphasis on the fact that no question of fact is in dispute, to go to a jury; but that in itself is of course not enough to give equity jurisdiction.

INNKEEPERS — DUTIES TO TRAVELERS AND GUESTS — WHETHER BAD REPUTATION IS AN EXCUSE FOR REFUSING ENTERTAINMENT. — The plaintiff, a noted professional prize-fighter, was refused accommodations by the defendants, the proprietors of a hotel. The judge charged the jury that it was for them to say whether such a violator of the criminal laws was a reputable person entitled to be admitted to a hotel. *Held*, that the charge was correct. *Nelson* v. *Boldt*, 180 Fed. 779 (Circ. Ct., E. D. Pa.).

For centuries the innkeeper has had a *primâ facie* duty to all travelers to furnish for reward such accommodations as he has. See *Anon.*, Keilw. 50; *Rex* v. *Collins*, Palm. 373. But certain circumstances afford him a justification for refusing entertainment. The same policy which imposes the duty requires him to exclude those whose conduct would render them dangerous to the personal security and comfort of his guests. *Goodenow* v. *Travis*, 3 Johns. (N. Y.) 427. See *Markham* v. *Brown*, 8 N. H. 523; *Queen* v. *Rymer*, 2 Q. B. D. 136. Where one seeks accommodations to engage in an act illegal or *contra bonos mores*, it is of course the innkeeper's duty to refuse him admission. *Curtis* v. *Murphy*, 63 Wis. 4. *Cf. Thurston* v. *Union Pacific R. Co.*, 4 Dill. (U. S.)

321; *Godwin* v. *Telephone Co.*, 136 N. C. 258. But previous lawbreaking is not *per se* a ground for exclusion. See *Coppin* v. *Braithwaite*, 8 Jur. 875; *Lucia* v. *Omel*, 46 N. Y. App. Div. 200. But for the principal case it would seem clear that the law prefers the necessities of one member of the traveling public to the sensibilities of others. *Chicago & N. W. Ry. Co.* v. *Williams*, 55 Ill. 185; *Brown* v. *Memphis & C. R. Co.*, 7 Fed. 51. And in spite of a few *dicta* the mere interest of the public servant should be no excuse, cases apparently *contra* being due to the fact that he need not allow the transaction of business on his premises. *Ford* v. *East Louisiana R. Co.*, 110 La. 414. But see *Jencks* v. *Coleman*, 2 Sumn. (U. S.) 221; *State* v. *Steele*, 106 N. C. 766. Engaged in a public undertaking, he can justify his failure to perform it only on grounds in which the public is interested. The principal case does not satisfy this test.

INSURANCE — CONSTRUCTION OF PARTICULAR WORDS AND PHRASES IN STANDARD FORMS — "THE INSURED" TO FURNISH PROOFS OF LOSS. — A mortgagor took out insurance payable to the mortgagee as his interest might appear. The policy provided that the mortgagee's interest should not be invalidated by any act or neglect of the mortgagor, and that "the insured" should furnish proofs of loss within a certain time. *Held*, that recovery by the mortgagee is not barred by the lack of proofs within the stipulated time. *Heilbrun* v. *German Alliance Insurance Co.*, 44 N. Y. L. J. 627 (N. Y. App. Div., Oct. 1910).

For a discussion of the principles involved, see 23 HARV. L. REV. 311.

INSURANCE — DEFENSES OF INSURER — EXEMPTION CLAUSE. — A fire insurance policy exempted the company from liability for loss caused directly or indirectly by certain causes; or for loss occasioned by or through earthquake. A statute provided that, when a peril is specially excepted in a policy, a loss which would not have occurred *but for* that peril is excepted, although the immediate cause of the loss was a peril not excepted. An earthquake caused a fire which spread to and destroyed the plaintiff's property. *Held*, that the plaintiff can recover on the policy. *Pacific Heating & Ventilating Co.* v. *Williamsburg City Fire Ins. Co. of Brooklyn*, 111 Pac. 4 (Cal.).

If the earthquake clause stood alone the company would not be liable. *Insurance Co.* v. *Boon*, 95 U. S. 117. See *Baker & Hamilton* v. *Williamsburgh, etc. Ins. Co.*, 157 Fed. 280. The court argues, however, that the use of the words "directly or indirectly" before the semicolon, coupled with their omission after it, has narrowed the scope of this exemption. The statute provides a strict rule for the construction of such a clause. The court construes the policy without reference to the statute, and then avoids it by saying that the excepted peril, fire caused by earthquake, never occurred, apparently because the fire did not originate on the plaintiff's premises. But where the excepted peril was fire from explosion, the United States Supreme Court held that it had occurred even though the explosion occurred and the fire originated in another building than the one insured. *Insurance Co.* v. *Tweed*, 7 Wall. (U. S.) 44. In an action on a similar policy it was held that the omission of "directly or indirectly" after the semicolon had waived the benefit conferred by the statute. *Williamsburgh, etc. Ins. Co.* v. *Willard*, 164 Fed. 404. The interpretation seems extreme.

INSURANCE — EMPLOYERS' LIABILITY INSURANCE — "INJURIES ACCIDENTALLY SUFFERED." — An employee contracted glanders while on duty, owing to the fault of his employer, and recovered damages from him. The employer held an employers' liability insurance policy, covering loss "for damages on account of bodily injuries accidentally suffered by employees of assured while on duty." *Held*, that the employer can recover from the insurance company

for the damages paid the employee. *Hood & Sons* v. *Maryland Casualty Co.*, 206 Mass. 223. See NOTES, p. 221.

INSURANCE — RIGHTS OF BENEFICIARY — MURDER OF INSURED BY BENEFICIARY. — After murdering the insured, the beneficiary of a life insurance contract sought to recover from the insurer the amount of the policy. *Held*, that he cannot recover. *Filmore* v. *Metropolitan Life Ins. Co.*, 92 N. E. 26 (Oh.).

After the murder of the insured by the beneficiary the insurance company admitted liability upon the policy. The administrator of the insured and the administrator of the beneficiary each claimed the proceeds. *Held*, that the administrator of the insured is entitled to recover. *Anderson* v. *Life Insurance Co. of Virginia*, 67 S. E. 53 (N. C.). See NOTES. p. 227.

INTERSTATE COMMERCE — WHAT CONSTITUTES INTERSTATE COMMERCE — FOREIGN CORPORATION PREPARING OUTSIDE STATE AND EXHIBITING IN IT ADVERTISEMENT OF LOCAL BUSINESS. — A foreign corporation contracted with a resident of Michigan to prepare and exhibit for three years in Michigan a sign, bearing an advertisement of the resident's business. The sign was to be prepared outside the state. In an action by the corporation for the sum due it on the contract after two years' exhibition, the defendant showed that the plaintiff had not fulfilled the requirements for doing business laid down by a statute which did not apply to interstate commerce. *Held*, that the transaction does not constitute interstate commerce. *Imperial Curtain Co.* v. *Jacob*, 127 N. W. 772 (Mich.). See NOTES, p. 230.

JUDGMENTS — COLLATERAL ATTACK — PUNISHMENT FOR CONTEMPT. — In contempt proceedings, the defendant contended that there were not sufficient grounds for granting the order which he had disobeyed. *Held*, that this defense is invalid. *Starkweather* v. *Williams*, 76 Atl. 662 (R. I.).

If a decree is utterly void, the party affected is justified in disregarding it, and may attack its validity when prosecuted for contempt. *Dodd* v. *Una*, 40 N. J. Eq. 672. A decree may be void because the court has no jurisdiction over the parties or subject matter. *In re Sawyer*, 124 U. S. 200. Or, a court having authority to hear the cause may grant relief of a kind that lies without its jurisdiction. *McHenry* v. *State*, 91 Miss. 562. When, however, the court has jurisdiction, the fact that an order was erroneously or improvidently issued does not justify disobedience. The proper remedy is an appeal on the merits. *Erie Ry. Co.* v. *Ramsey*, 45 N. Y. 637; *Clark* v. *Burke*, 163 Ill. 334.

LANDLORD AND TENANT — ASSIGNMENT AND SUBLETTING — SUB-LESSEE'S BREACH OF COVENANT TO REPAIR: MEASURE OF DAMAGES. — In 1855, A leased premises for ninety-nine years to B, who covenanted to repair. In 1887 B sublet to C, who covenanted to repair in the same terms as those of the head lease. In 1908 A sued B for failure to repair, and B, in addition to damages, paid a fine and costs to avoid a forfeiture. B thereupon sued C on his covenant, and sought to include in his damages the costs of the former action. *Held*, that he cannot recover the costs. *Clare* v. *Dobson*, *London Times*, Oct. 21, 1910, p. 3 (K. B. D.).

If C's covenant were to perform the covenant in the head lease, it would be a covenant of indemnity and B's costs would be recoverable. *Hornby* v. *Cardwell*, 8 Q. B. D. 329. But a covenant by a sub-lessee to repair, although in the terms of the lessee's covenant, is not a covenant of indemnity. *Pontifex* v. *Foord*, 12 Q. B. D. 152. The rule of damages, however, in breach of contract covers damages which might reasonably have been contemplated by both parties when the contract was made. *Hadley* v. *Baxendale*, 9 Exch. 341. Under

this rule, in cases of sale and re-sale, the vendee has been allowed to recover from the vendor his costs in defending an action brought by the sub-vendee for breach of implied warranty. *Hammond & Co.* v. *Bussey*, 20 Q. B. D. 79. See FOA, LANDLORD AND TENANT, 4 ed., 234. But the decision in the principal case rests on good authority. *Penley* v. *Watts*, 7 M. & W. 601; *Walker* v. *Hatton*, 10 M. & W. 249. B, who was himself in default, might have avoided this added expense by paying A before suit was brought. The costs are therefore too remote to have been reasonably within the contemplation of the parties as probable damages arising from C's breach.

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — PUBLICATION INVITED OR PROCURED BY PLAINTIFF. — The defendant at the plaintiff's request repeated at a club meeting an accusation against the plaintiff, made originally to the plaintiff alone. *Held*, that the publication was privileged. *Shafer* v. *Haupt*, 58 Pitts. Leg. J. (Pa., Allegheny Co. C. P., July 6, 1910).

The plaintiffs induced A to write a letter to the defendant, expecting a defamatory reply on which they could base an action. *Held*, that the plaintiffs caused the publication and cannot recover. *Melcher* v. *Beele*, 110 Pac. 181 (Colo.).

Many authorities agree with the Pittsburgh case in putting the defense in such cases on the ground of conditional privilege. *Warr* v. *Jolly*, 6 C. & P. 497; *Billings* v. *Fairbank*, 136 Mass. 177. Other cases hold that, at least where the plaintiff authorizes the publication in order to base an action thereon, the rule of *volenti non fit injuria* applies. *Sutton* v. *Smith*, 13 Mo. 120; *Heller* v. *Howard*, 11 Ill. App. 554. It is submitted that this is the true ground of defense in both cases. The defense of conditional privilege seems properly to be based on the defendant's right to speak in his own interest, or on a duty to speak in the interest of others. Neither of these elements is present in these cases. Furthermore, although the existence of wrong motive would defeat conditional privilege, it is submitted that in these cases the plaintiff would not be allowed to set up the defendant's wrong motive as a ground for his recovery.

LIMITATION OF ACTIONS — NATURE AND CONSTRUCTION OF STATUTE — MUNICIPAL CORPORATIONS AS AFFECTED BY STATUTE. — In an action by a city to recover damages for injuries to a bridge, the defendant proved that the claim had not accrued within the period of limitation. *Held*, that the action cannot be maintained. *City of Chicago* v. *Dunham Towing & Wrecking Co.*, 92 N. E. 566 (Ill.).

Against the state, as sovereign, no time runs. *Lindsey* v. *Lessee of Miller*, 6 Pet. (U. S.) 666. But where the state is merely a nominal party, statutes of limitations apply. *Miller* v. *State*, 38 Ala. 600. *Cf. Wasteney* v. *Schott*, 58 Oh. St. 410. And where the state becomes a member of a trading company, its claims may be barred. *Bank of the United States* v. *M'Kenzie*, 2 Brock. (U. S.) 393. *Contra*, *President and Directors of the State Bank of Illinois* v. *Brown*, 2 Ill. 106. Many cases hold that all governmental agencies except the state are subject to the statute under all circumstances. *Hartman* v. *Hunter*, 56 Oh. St. 175; *Knight* v. *Heaton*, 22 Vt. 480. But by the weight of authority, public rights, enforced by cities or counties, are not lost by lapse of time. *Greenwood* v. *Town of La Salle*, 137 Ill. 225; *City of Osawatomie* v. *Board of Commissioners of Miami County*, 78 Kan. 270. And the better cases hold that the statute does not bar claims of public institutions, such as schools and hospitals. *Eastern State Hospital* v. *Graves' Committee*, 105 Va. 151. See 20 HARV. L. REV. 644. It has even been held that where, by legislation, the statute of limitations runs against the state, still property devoted to public uses, such as streets, is not lost by adverse possession. *Ralston* v. *Town of Weston*, 46 W. Va. 544. *Contra*, *City of St. Paul* v. *Chicago, Milwaukee, & St. Paul R. Co.*,

45 Minn. 387. Thus, in a chaotic mass of authority, the better decisions seem to establish that a right of the public, by whatever agency of government it may be held, is not lost by lapse of time, but that non-public rights may be barred. The principal case seems entirely correct.

MASTER AND SERVANT — EMPLOYERS' LIABILITY ACTS — CONSTITUTIONALITY OF CLAUSE MAKING EMPLOYER'S NEGLIGENCE IMMATERIAL. — The plaintiff sued under the Workmen's Compensation Act of 1910 to recover for injuries received while in the defendant's employ. The statute provides that workmen in certain occupations, declared by the act to be "dangerous," may recover for injuries received in such employment, although the employer is not negligent, provided the injured party himself is not guilty of serious or wilful misconduct. *Held*, that the act is constitutional. *Ives* v. *South Buffalo Ry. Co.*, 68 N. Y. Misc. 643.

The court in reaching this decision based its argument on well-founded authorities and analogies. Legal liability without fault is frequently found in our law. The liability of the master for the acts of his servant is one example. *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526. The carrier's liability as insurer is another. *Coggs* v. *Bernard*, 2 Ld. Raym. 909. Again, the state may prescribe the liabilities under which corporations created by its laws shall conduct their business. *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205. And this may be carried so far that a statute providing that a railroad previously chartered shall be liable for all injuries to passengers, irrespective of its own negligence, is constitutional. *C. R. I. & P. Ry. Co.* v. *Zernecke*, 183 U. S. 582. Most legislation applies to particular classes, but if all affected by it are treated alike, under the same conditions, equal protection is not denied. *Missouri Pacific Ry. Co.* v. *Mackey*, *supra*. Hence any practical and reasonable classification, not palpably arbitrary, is constitutional. *Louisville & Nashville Ry. Co.* v. *Melton*, 218 U. S. 36. Since there is no culpability on either side in industrial accidents such as the above, and as the employers only shift the loss on to society, such action by the legislature appears not only reasonable but a just solution of an economic problem.

MORTGAGES — PRIORITIES — SUCCESSIVE ASSIGNMENTS OF CHOSE IN ACTION. — A mortgaged his life insurance policy by deposit with the insurance company for a loan of £250, and later obtained a loan from C on the security of the same policy. Then D, having no notice of C's claim, advanced £600 on the policy, which was handed over to him. £250 of this amount was paid directly to the insurance company, in satisfaction of its claim. C gave prior notice to the insurance company. *Held*, that D has priority over C as to the £250, but not as to the rest of his claim. *In re Weniger's Policy*, [1910] 2 Ch. 291.

The claim of the insurance company was entitled to priority over C's charge, for the company, as obligor, had due notice of its own claim as mortgagee. *Willes* v. *Greenhill*, 29 Beav. 376. Then as to the £250, the amount advanced by the insurance company, D, who stepped into the shoes of the insurance company, obtained priority. *Peacock* v. *Burt*, 4 L. J. Ch. 33. As to the remainder of D's claim, if it were purely equitable, D must be postponed to C under the English rule that the assignee first to give notice to the obligor prevails. *Foster* v. *Cockerell*, 3 Cl. & F. 456. The result is the same under the American rule that the assignees rank in the order in which the assignments were made. *Thayer* v. *Daniel*, 113 Mass. 129. But, whereas C had a mere equitable charge, if D was given possession, by way of assignment, of the *res* embodying the obligation, it would seem that he obtained a legal right. *Cf. Harrison* v. *McConkey*, 1 Md. Ch. 34; *Fisher* v. *Knox*, 13 Pa. 622. And equity will not deprive D of the legal right which he has obtained for value and in good faith. See AMES, CASES ON TRUSTS, 328.

MORTGAGES — TRANSFER OF RIGHTS AND PROPERTY — ORAL SALE OF MORTGAGOR'S INTEREST IN ABSOLUTE DEED TO MORTGAGEE. — Land was conveyed by absolute deed to the defendant as security for a debt. Subsequently the grantor orally released all his interest in the land for a good consideration. The grantor having become bankrupt, his trustee asserted an interest in the land. *Held*, that the defendant has the absolute title. *Hutchison* v. *Page*, 92 N. E. 571 (Ill.).

Where an absolute deed is given to secure a debt, the grantor may always show, in spite of the Statute of Frauds, that a mortgage was intended, as equity will disregard the statute rather than allow the unjust result of a different rule. *Carr* v. *Carr*, 52 N. Y. 251. However, equity should only give this assistance, if on all the facts it is fair to do so, and when the plaintiff has sold his interest to the defendant for a fair consideration, the technical defense of no writing should not be allowed. *Shaw* v. *Walbridge*, 33 Oh. St. 1. Accordingly, when the mortgagee has legal title, the decided weight of authority allows no interference by equity with the absolute deed. *Cramer* v. *Wilson*, 202 Ill. 83; *Bazemore* v. *Mullins*, 52 Ark. 207. *Contra*, *Van Keuren* v. *McLaughlin*, 19 N. J. Eq. 187. Where the mortgagee has only a lien, even though his deed is absolute on its face, it is argued that to enforce this parol agreement is to put title into the mortgagee without a writing. *Odell* v. *Montross*, 68 N. Y. 499. But the mortgagor has title only by reason of the interference of equity with the plain words of the deed, so here, too, equity should refuse its assistance if it would be unfair to grant it. *Ferguson* v. *Boyd*, 169 Ind. 537.

OFFER AND ACCEPTANCE — BILATERAL CONTRACTS — MISTAKE IN TRANSMISSION OF OFFER BY TELEGRAPH. — The defendant company, in transmitting an offer of sale from the plaintiff to a third party, negligently altered the message so as to quote a lower figure. The offeree accepted, and the plaintiff parted with the goods at the reduced price. *Held*, that the plaintiff was not bound by the acceptance of the offer as received. *Strong* v. *Western Union Telegraph Co.*, 109 Pac. 910 (Idaho).

In the majority of cases, the liability of the sender to abide by the message as received has been argued as dependent solely upon whether or not the telegraph company is his agent. This question the American courts have generally answered in the affirmative. *Western Union Telegraph Co.* v. *Shotter*, 71 Ga. 760; *Durkee* v. *Vermont Central R. R.*, 29 Vt. 127. A contrary doctrine is upheld by the English and some American decisions; in consequence of which they fail to find the mutual assent necessary to make a binding agreement. *Henkel* v. *Pape*, L. R. 6 Exch. 7; *Pepper* v. *Western Union Telegraph Co.*, 87 Tenn. 554. That the relation is not one of agency must be conceded, in view of the well-settled distinction between an agent and an independent contractor. *Lawrence* v. *Shipman*, 39 Conn. 586. See GRAY, COMMUNICATION BY TELEGRAPH, § 106. However, it seems that a meeting of minds sufficient to create a binding contract can be found without resorting to a doctrine of agency, for the "intent" of two contracting parties is to be ascertained from a reasonable interpretation of their expressions, not from their secret intention. *Harris* v. *Amoskeag Lumber Co.*, 97 Ga. 465; *Smith* v. *Hughes*, L. R. 6 Q. B. 597. So where the offerer has chosen to express himself through the medium of the telegraph, he will be bound by such expressed intent. *Ayer* v. *Western Union Telegraph Co.*, 79 Me. 493. But if the mistake is apparent, the sender will not be bound. *German Fruit Co.* v. *Western Union Telegraph Co.*, 137 Cal. 598.

RESTRAINT OF TRADE — MONOPOLY — CONTRACTS TO SELL AT FIXED PRICE. — The plaintiff manufactured medicinal tablets under a secret process, not patented. He sold the tablets only under an extensive system of contracts with wholesale and retail druggists, by which the former agreed to sell the

tablets only to designated retailers, who in turn bound themselves to maintain the prices fixed by the plaintiff. *Held*, that the system of contracts is void at common law as in restraint of trade. *W. H. Hill Co.* v. *Gray & Worcester*, 127 N. W. 803 (Mich.).

The seller's right to fix the price at which the goods may be resold by the buyer, if a single transaction appears, is undoubted. *Garst* v. *Harris*, 177 Mass. 72. The seller should have the same right, as an incident to his property in the goods, when he sells to many buyers. That these buyers must all sell the goods at the same price is not an undue restraint of trade. *Dr. Miles Medical Co.* v. *Platt*, 142 Fed. 606; *Park & Sons Co.* v. *National Wholesale Druggists' Ass'n*, 175 N. Y. 1. *Contra*, *Park & Sons Co.* v. *Hartman*, 153 Fed. 24. The contracts cannot be illegal as tending toward monopoly, for before the contracts are made the seller necessarily has a monopoly over his own goods. He gains no greater control over the market than he already had. *Dr. Miles Medical Co.* v. *Jaynes Drug Co.*, 149 Fed. 838. A combination to injure a merchant by preventing him from obtaining goods is unlawful. *Delz* v. *Winfree*, 80 Tex. 400. Also, two competitors may not enter into an agreement to keep up the price. *More* v. *Bennett*, 140 Ill. 69. But the present case presents neither of these vicious elements. To uphold the contracts would simply allow freedom of trade to the manufacturer to do what he will with his own. *Elliman* v. *Carrington*, [1901] 2 Ch. 275.

Restraints on Alienation — Validity of Restraint on Alienation of Fee When Qualified as to Time. — A conveyed land in fee to B, his son, reserving to himself an interest for life in the rents and profits, and with a condition that B should not sell during A's life. *Held*, that the condition is valid. *Fraszier* v. *Combs*, 130 S. W. 812 (Ky.).

A complete prohibition against the alienation of a vested legal estate in fee is void. See Gray, Restraints on the Alienation of Property, §§ 13–26, 105, 113. By the weight of authority a condition or direction to this effect is void, although the suspension of the power of alienation is for a limited time. *Potter* v. *Couch*, 141 U. S. 296, 315; *Mandlebaum* v. *McDonell*, 29 Mich. 78; *In re Rosher*, 26 Ch. D. 801. But a doctrine which seems to have had its origin in unconsidered *dicta*, that a restraint for a reasonable length of time is valid, has become firmly established in Kentucky and Ontario. *Stewart* v. *Brady*, 3 Bush (Ky.) 623; *Lawson* v. *Lightfoot*, 27 Ky. L. Rep. 217; *Earls* v. *McAlpine*, 27 Grant Ch. (Ont.) 161. By statute in Kentucky, the rule against perpetuities applies to conditions and directions restraining alienation. Stats. Ky., 1909, § 2055. The doctrine can therefore have no disastrous results in that state, and in order to avoid litigation as to the reasonableness of any particular restraint, the courts might well go to the extent of holding that all restraints which do not violate the rule are good. See *Johnson's Trusts* v. *Johnson*, 25 Ky. L. Rep. 2119; *Morton's Guardian* v. *Morton*, 120 Ky. 251. It has recently been held, however, in a decision disapproving of the doctrine to which the courts of the state are committed, that a restraint for the life of the devisee is unreasonable. *Harkness* v. *Lisle*, 117 S. W. 264 (Ky.).

Specific Performance — Defenses — Lack of Mutuality of Remedy. — In a contract of employment with the plaintiff company, the defendant covenanted not to compete with the plaintiff company during the term of employment or for seven years thereafter. During the term of employment, an order was made to wind up the company, and the defendant was given notice that his services would not be required further and that his salary would be discontinued. The defendant began to compete with the company, who sought to enjoin him. *Held*, that he cannot be enjoined. *Measures Bros., Ltd.* v. *Measures*, [1910] 2 Ch. 248.

A sufficient basis for refusing the injunction (whether the covenant not to

compete is severable from the rest of the contract or not), is lack of mutuality of remedy, as the defendant could not obtain performance of the plaintiff's promise. See 23 HARV. L. REV. 294; 3 COL. L. REV. 1. Although the court does not rest its decision on this ground alone, it really adopts the doctrine, the Master of the Rolls saying, "The plaintiffs have not given and cannot in future give, the defendant this consideration. . . . The plaintiffs are not entitled against the defendant to specific performance . . . without performing, and they cannot perform, the clauses which that agreement contains in favor of the defendant. . . . It would be inequitable if the plaintiffs could have that relief." The case is consequently a welcome addition to the authorities supporting this theory of mutuality.

TRADE-MARKS AND TRADE-NAMES — MARKS AND NAMES SUBJECT OF OWNERSHIP — DESCRIPTIVE WORDS IN FOREIGN LANGUAGE. — The plaintiff manufactured a wine, which it called Tipo Chianti. Later the defendant offered its wine under the name Tipo Puglia. "Tipo" is a common Italian word, meaning "of the nature of." On the ground that "Tipo" was its trade-mark, the plaintiff obtained a temporary injunction, restraining the defendant from using the term. *Held*, that the injunction cannot be sustained. *Italian Swiss Colony* v. *Italian Vineyard Co.*, 110 Pac. 913 (Cal., Sup. Ct.).

The office of a trade-mark is to point out distinctively a maker's goods, so that he may profit by their reputation with the public, and the public, in turn, may be assured that they are getting that maker's wares. See *Amoskeag Manufacturing Co.* v. *Spear*, 2 Sandf. (N. Y.) 599, 605. Words, letters, numerals, or devices may be used as trade-marks. *Shaw Stocking Co.* v. *Mack*, 12 Fed. 707. But words which are merely descriptive and so can be applied equally well to other articles of a like kind may not be appropriated as trade-marks. CAL. CIV. CODE, 1906, § 991; *Caswell* v. *Davis*, 58 N. Y. 223. This principle applies to foreign as well as to English words. *Davis* v. *Stribolt*, 59 L. T. Rep. N. S. 854; *Burke* v. *Cassin*, 45 Cal. 467; *Selchow* v. *Chaffee & Selchow Mfg. Co.*, 132 Fed. 996. But if by long user a descriptive term comes to signify to the public the goods of this particular manufacturer, an imitator will be enjoined on the ground of unfair competition. *Reddaway* v. *Banham*, [1896] A. C. 199. Since, however, the essence of that wrong is the fraud of passing off one maker's products for those of another, the competition is not unfair if, as in the principal case, the packages of the two rival brands are so unlike in appearance that there can be no confusion. *Dadirrian* v. *Yacubian*, 72 Fed. 1010. See 16 HARV. L. REV. 272 *et seq.*

TRUSTS — RESTRAINTS ON ALIENATION OF CESTUI'S INTEREST — POSTPONEMENT OF ENJOYMENT. — The testatrix left property in trust for B, C, and D, providing in her will that the legacies should not be paid until D, the youngest legatee, should have arrived at the age of twenty-five years. Upon coming of age B sought to compel payment of the legacy. *Held*, that she is not entitled to it. *King* v. *Shelton*, 38 Wash. L. R. 714 (D. C., Ct. App., Nov. 2, 1910). See NOTES, p. 224.

WAGERING CONTRACTS — RENEWED PROMISE TO PAY FOR NEW CONSIDERATION. — In consideration of the defendant's renewed promise to pay the plaintiff an over-due gambling debt, the plaintiff refrained, for a specified time, from publishing him as a defaulter. *Held*, that the plaintiff can recover on the new contract. *Wilson* v. *Conolly*, 129 L. T. 572 (Eng., K. B. D., Oct. 14, 1910).

For the discussion of a precisely similar case, see 22 HARV. L. REV. 149. The reasoning of the courts seems unimpeachable, and the criticism directed against the decisions as "whittling away the Gaming Act" should, more properly, be directed towards the Act itself, for not frankly declaring that a wagering con-

tract is illegal, instead of merely making it void. For then, as under the American statutes, the vice of the original transaction would taint the subsidiary one and the purpose of the statute would not be defeated.

WILLS — EXECUTION — SIGNATURE OF TESTATOR AT END OF WILL. — A will was written on three pages of a folded sheet of paper. In drawing up the will, the testatrix wrote the first page, then the third, and finished on the second, where she signed at the completion of her disposition. *Held*, that the will was signed "at the end thereof," within the meaning of the statute. *In re Stinson's Estate*, 77 Atl. 807 (Pa.).

The authorities on this point are confined to England, New York, and Pennsylvania. In accordance with the more liberal doctrine of the principal case, the English courts have held in similar cases that the end of a will is the logical end. *In the Goods of Watton*, L. R. 3 P. & D. 159; *In the Goods of Stoakes*, 23 Wkly. Rep. 62. So, too, where matter following the signature, in point of space, is incorporated by reference or by the logical sequence of the language into a part preceding the signature, the courts of both jurisdictions have held this to be a sufficient compliance with the statute. *Baker's Appeal*, 107 Pa. St. 381; *In the Goods of Birt*, L. R. 2 P. & D. 214. But the New York courts have adopted a stricter interpretation, and require the signature to be at the physical end of the instrument. *Matter of Andrews*, 162 N. Y. 1; *Matter of Conway*, 124 N. Y. 455. See also 13 HARV. L. REV. 686.

WITNESSES — PRIVILEGE AGAINST SELF-INCRIMINATION — USE OF BODY AS AN EXHIBIT. — The defendant, while before a military court of investigation, was compelled to put on a blouse, found near the scene of a murder, to see whether it fitted him. The defendant was later indicted, and at the trial a witness testified that the prisoner put the blouse on and it fitted him. *Held*, that the evidence is admissible. *Holt* v. *United States*, U. S. Sup. Ct., Oct. 31, 1910.

The privilege against self-incrimination properly applies only when the evidence would have to be furnished by the person claiming the privilege in the capacity of one uttering testimony. It is not so broad as to protect the defendant in every respect from being the means by which evidence tending to incriminate him is produced. To use a man as an exhibit does not infringe the privilege; to treat him as a witness to extort communications from him does. See 3 WIGMORE, EVIDENCE, §§ 2250, 2251, 2263, 2265. But often the privilege has been extravagantly extended to exclude the use of the body as an exhibit. *State* v. *Jacobs*, 5 Jones, Law (N. C.) 259 (exhibiton to jury to prove amount of negro blood); *Blackwell* v. *State*, 67 Ga. 76 (standing up to show defendant lacked one foot); *Stokes* v. *State*, 5 Baxt. (Tenn.) 619 (making footprints). Nor does a distinction between using the evidence to prove the issue of identification and using it to prove any other issue seem tenable, since the issue of identification is equally material to the proof of guilt. *Contra*, *State* v. *Johnson*, 67 N. C. 55. In many cases the court might refuse to permit such evidence on other grounds. See *People* v. *McCoy*, 45 How. Prac. (N. Y.) 216; *State* v. *Height*, 117 Ia. 650. *Cf. Union Pacific Ry. Co.* v. *Botsford*, 141 U. S. 250. The principal case accords with many authorities in supporting the above analysis, and declares what is undoubtedly the proper limits of the privilege. *State* v. *Ah Chuey*, 14 Nev. 79 (tattoo marks on chest); *State* v. *Graham*, 74 N. C. 646 (putting foot in footprints). But see 22 Alb. L. J. 144.

BOOK REVIEWS.

THE ELEMENTS OF JURISPRUDENCE. By Thomas Erskine Holland, K. C., etc. Eleventh Edition. Oxford, London, and New York. Oxford University Press. 1910. pp. xi, 451.

The highest praise that can be given to this new edition of Professor Holland's well-known book is to say that it is not materially different from the edition immediately preceding. In the eleventh edition several slight changes are made in the text to conform with recent decisions, and numerous references to these decisions are added; references also being given to changes introduced by the International Prize Court Convention of 1907, the Japanese Civil Code, the Brussels Maritime Law Conference of 1909, the new Swiss Code and the recent Hague Conferences, as well as by recent English statutes, such as the act of 1906 amending and consolidating the statutory provisions relating to fellow servants, the Trade Disputes Act of the same year and the Deceased Wife's Sister's Marriage Act of 1907. Citations are also given to new treatises, and there are a few additional references to and definitions from such older writers as Dante, Zouche, John Erskine, and Bentham.

The arrangement of the eleventh edition is exactly the same as that of the tenth. In Chapter V, *The Sources of Law*, a much clearer classification has replaced the old one, which confused the different meanings of *source*. This is the most considerable change in the book. The effects of aerial navigation upon the law are not forgotten (pp. 169, note 4; 393 and note 3). The statement of our naturalization laws affecting colored races has been made more exact (p. 350). Professor Holland has changed his statement concerning reversals of its decisions by our Supreme Court. In the tenth edition, after laying down the principle that the House of Lords is bound by its own decisions, he adds, "This is not the case in the Privy Council, or in the Supreme Court of the United States." In the eleventh edition he states that the House of Lords is bound by its decisions, "as is also, apparently, the Supreme Court of the United States" (pp. 69–70). As authority for this change he gives *Wright* v. *Sill* [2 Black (U. S.) 544], cited by Dr. Hannis Taylor, "The Science of Jurisprudence," p. 511. C. H. MCI.

PRECEDENTS OF PLEADING AT COMMON LAW. By Charles A. Keigwin. Washington: John Byrne and Co. 1910. pp. xxx, 607. 8vo.

This work was prepared by the editor, Professor Keigwin, primarily for the use of students in the National University Law School. It is divided into two parts. In the first part the editor has compiled the records of several old English cases most of which are reported in the first volume of Saunders' Reports, and which therefore illustrate the principles of the law of pleading at the time of its greatest perfection as an art. In footnotes the editor explains the significance of passages of the records the meaning of which would be obscure to a student. In the second part of the book he states supposititious facts and frames pleadings based on those facts such as would be employed at the present day in jurisdictions adhering to the common-law procedure, in order to illustrate the substantial identity of the principles of the old and the modern common-law pleading, and to show at the same time the greater liberality of the present-day courts in applying those principles. The book is intended to be used, and may profitably be used, in connection with a study of the abstract principles of pleading. A. W. S.

A TREATISE ON SECRET LIENS AND REPUTED OWNERSHIP. By Abram I. Elkus and Garrard Glenn, of the New York Bar. New York, Baker, Voorhis and Company, 1910. pp. xxx, 183.

An owner of chattels, who has entrusted possession to another, has in general — and under the law of bailment and pledge has had for centuries — an interest valid against the world; an opposite principle, indeed, would deprive property rights of half their commercial value. But where one who secretly obtains or retains title entrusts possession to another under such circumstances that a third party who gives credit to the depositary is reasonable in supposing the man with whom he is dealing to have the complete legal interest, the third party will, on the insolvency of his promisor, be preferred to the legal owner. From the scattered domains of agency, of trusts, of sales, of bailments, and of bankruptcy Messrs. Elkus and Glenn have gathered together an imposing mass of authorities upon the conditions which render reliance upon apparent, but unreal, ownership reasonable.

English bankruptcy legislation has concerned itself with reputed ownership for centuries. In the United States, apart from state statutes necessitating record for those mortgages, and, less universally, those conditional sales by which ownership is divorced from possession, the establishment of the doctrine that secret liens are to be discouraged must be ascribed to the courts alone. The connection between English enactments and early American decisions is traced in a discussion that may fairly be called a contribution to legal history.

Our authors are less happy in their exposition of the general doctrines of the present-day law. Profuse quotations and lengthy summaries sufficiently establish the general agreement of the cases upon the equitable doctrine that, in some instances where it will benefit C, property which, as between A and B belongs to A, shall be made to discharge the debts of B. But there is too little analysis of decisions. Successive chapter heads proclaim as the foundation for C's rights the principle of estoppel and the requirement of good faith on the part of A; and the "ultimate question" is apparently recognized to be a consideration of commercial policy. The fact is, of course, that courts agreeing in result have displayed organic differences in reasoning. This fact Messrs. Elkus and Glenn steadily ignore, and the opportunity peculiar to those who introduce an important doctrine, of resting it upon sound principles, they have, accordingly, lost.

The incisive comments upon choses in action make clear that the general doctrine is broad enough to include occasional instances of ownership separated from a merely metaphysical possession. The chapter on recording acts is vague in its differentiation of the common types of legislation. A fuller citation of decisions outside of New York would have strengthened the discussion of mortgages of after-acquired property, and of the equitable interests known as floating charges and recognized by the English courts. The topics of consignment arrangements and trust receipts possess a significance already great, and sure to grow; the practitioner will be thankful for the writers' full statement of the present business law. The concluding chapter upon the corporate entity is of doubtful relevancy upon the general thesis of the work; for the doctrines involved are explicitly stated by the leading case to be doctrines of corporation law in no way peculiar to the problems of ownership and possession of personal property. W. H. P.

THE INDIAN CONTRACT ACT. With a Commentary, Critical and Explanatory. By Sir Frederick Pollock, Bart., assisted by D. F. Mulla. Second Edition. London: Sweet and Maxwell, Limited. 1909. pp. lxiii, 744.

It is difficult for an American lawyer to review a work such as this. Sir Frederick Pollock himself undertook the preparation of the Contract Act

originally, only on condition that another familiar with the decisions on Indian law should collect and digest the cases.

With the merits of the Indian Contract Act we cannot deal within the limits of a book review. That act suffered, it has been pointed out, by passing through three different hands in the course of its preparation, — the Indian Law Commission, the Legislative Department in India, and Sir James Stephen. In the course of this, and particularly at the hands of the Legislative Department in India, sections here and there were borrowed from the draft and code prepared for New York by Dudley Field, which, as Sir Frederick Pollock says, "is the worst piece of codification ever produced. . . . The clauses on fraud and misrepresentation in contract — which are rather worse if anything than the average badness of the whole — were most unfortunately adopted in the Indian Contract Act." But in spite of these and other criticisms the act is still unrevised.

It is needless to say that the editorial and critical work is carefully done. The name of the editor assures that. This second edition is published within four years of the first, and is called for by reason of the increase of decisions of English and Indian courts. The arrangement is the same, the chief changes being the inclusion, somewhat against the editor's will but because of the necessities of the case, of references to unofficial Indian reports, and in enlarged commentaries on sales, agency, and partnership, those on sales being by Mr. J. B. Eames, those on agency by Mr. William Bowstead, and those on partnership by the editor himself.

The book is interesting to those interested in codifications and in foreign systems of law, but cannot be of general use. S. H. E. F.

Work Accidents and the Law. By Crystal Eastman. New York: Charities Publication Committee. 1910. pp. xvi, 345. 8vo.

"Work Accidents and the Law" is one of a number of volumes known as "The Pittsburgh Survey," which are part of the publications provided for by the Russell Sage Foundation. It is a clear and very forceful exposition of the effect of the present provision made in Pennsylvania — and Pennsylvania does not differ radically in this particular from the rest of the United States — to prevent industrial accidents and to compensate industrial workers and their families for the loss caused by such accidents. It is based upon facts most carefully presented and analyzed to show who are responsible for the accidents, who in fact bear the resulting financial loss and what are the financial resources of the losers. Its exposition of the present law is brief and clear.

Its consideration of the efficiency of our law as a means of preventing accidents not only shows that probably over one-third of the fatal accidents are due to some form of negligence attributable to the employer or his superintendents; but it deals with the practical possibility of enforcing laws that would prevent the recurrence of the situations which have actually caused accidents, by taking fully into account the provisions for safety in excess of those required by law, which are now enforced by several companies.

The consideration of the efficiency of the present law as a means of providing proper compensation for the loss incurred is presented not merely as an academic question based upon the entirely inadequate compensation which the facts show. The practical situation is concretely dealt with by summarizing the meagre resources of employees, both married and single, accurately estimating the relief to be gained through insurance, voluntary relief associations, and the Carnegie Relief Fund, stating the legal expenses and liability insurance premiums of the employer, estimating the administrative expense to the state. The reader who is interested in social problems is delighted to find that

he has before him not mere argument but matter-of-fact truth logically arranged. He is prepared to consider carefully the comparison of the various forms of the American accident law, which grants compensation only for loss due to the employer's negligence, with the systems of England, France, and Germany, which give a definite compensation for every loss regardless of negligence. The reader may have believed implicitly in the common law as inherently just and economically sound, since it makes each party responsible for his own fault, and establishes through freedom of contract the proper compensation of labor in the process of production. But no matter how deeply rooted the reader's opinion may have been, he cannot fail to be impressed with the argument presented in this book.

It is true that the European systems shift the losses caused by industrial accidents from the employee to the employer and through the employer to the consumer. But in so far as this change secures to the employee compensation for accidents due to the employer's negligence it is only a far more efficient administration of the common-law theory. In so far as the change secures to the employee compensation for unavoidable accidents it is but a practical means of making the compensation for labor proportionate to the risks involved — a result by no means secured by mere freedom of contract. The real expense of the change lies in the compensation given to employees for accidents due to their own negligence — less than one-third of the accidents. This expense is to be balanced by these advantages: the assurance to employees of fair compensation in cases where they are not negligent; the elimination for the employer and employee and for the state of administrative expenses; the tendency of the European form of law to induce employers to decrease the causes of accidents.

It is impossible to give here even a general outline of the facts presented in the book. They cover the five hundred and twenty-six fatal accidents which occurred in Allegheny County — the Pittsburgh District — between July 1, 1906, and June 31, 1907, and the five hundred and nine non-fatal accidents which occurred in the same place in April, May, and June of 1907. At each step in the argument after an analysis of these cases there follows a comprehensive tabulation or diagram of the result. Such a scientific treatment has not robbed the book of human interest, because its descriptions are forcefully clear and brief and its illustrations have been admirably chosen.

P. K.

REMEDIES BY SELECTED CASES. By Samuel F. Mordecai and Atwell C. McIntosh. Durham, N. C.: S. F. Mordecai and A. C. McIntosh. 1910. pp. xcix, 1018.

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CORPORATE PERSONALITY.

FROM the earliest period of our judicial history, lawyers and judges have reiterated the doctrine that a corporation is an intangible legal entity, without body and without soul. In almost Athanasian terms, the orthodox doctrine of a corporation as a legal person, separate and distinct from the personality of the members who compose it, has been defined and propagated. In these latter days, a sect of heretics has arisen who, rejecting the teachings of the fathers, deny or disparage this great doctrine. But these heretics do not seek to belittle the questions at issue between themselves and the orthodox party. Far from it. They rather strive to exaggerate the importance of those questions, in order to pose as great reformers engaged in a gigantic task of emancipating the legal world from the thraldom of a mediæval superstition.

In the heated controversy thus engendered, it is difficult indeed for any American lawyer writing upon the subject of corporations to avoid declaring himself. If he endeavors to preserve silence, his failure to speak is attributed to cowardice, or to a lack of clearly defined convictions upon a fundamental question. He is not permitted to treat the whole controversy with indifference. The direct interrogatory is pressed upon him, "Under which king?" He is called upon to vouch for his legal character by formulating his creed, in much the same way that each English sovereign has heretofore been required by his coronation oath to testify his adherence to the principles of the Reformation.

But sharp as the controversy may appear to have been among us, it is mere guerilla warfare, a few desultory skirmishes, in compari-

son with the pitched battles and protracted campaigns in which Continental jurists have waged war over this doctrine. With us, the literature of the subject, on the orthodox side, consists in a *dictum* reported by Coke,[1] referred to by Blackstone,[2] and reiterated monotonously by every law student, together with a number of modern decisions which apply, or misapply, the doctrine. The opposing party can point to a few statements in text-books, often contradicted or seemingly contradicted by other passages in the same treatises, and to some modern decisions and *dicta* in which judges have somewhat ostentatiously repudiated the doctrine as a mere conceit of the schoolmen. On the Continent, on the other hand, whole volumes have been devoted to this one doctrine, and rival theories have been developed whose adherents have formed themselves into parties almost as well-defined as the Epicureans, the Stoics, or any other of the historic philosophic sects. In Germany, in France, in Italy, learned treatises occupied wholly with this doctrine of corporate personality are constantly appearing.[3]

Our complete oblivion to all this wealth of controversial learning strikingly exhibits the insularity of our English law. Are not Coke and Blackstone, sources of the common law, better than all the scholars of Europe? It may be that this patriotic confidence is justified, and that all that foreign learning furnishes no lesson from which we can derive profit; but if so, it would be reassuring to find some defender of our faith who, having imperilled his legal soul by mastering the occult learning of Continental jurists, should be able to state reasons why no Anglo-American lawyer need vex his English soul with that mass of foreign lore. Here, however, it

[1] Sutton's Hospital Case, 10 Co. 32.

[2] 1 Bl. Comm. 476, 477.

[3] A complete bibliography of the subject would be of appalling size. The following are a few of the more recent foreign treatises dealing with this subject: Binder, Das Problem des juristischen Persönlichkeit (Leipzig, 1907); Hölder, Natürliche und juristische Personen (Leipzig, 1905); Meurer, Die juristische Personen (Stuttgart, 1901); Mayer, Die juristische Person und ihre Verwertbarkeit im öffentlichen Recht (Tübingen, 1908); Schwabe, Die juristische Person und das Mitgliedshaftsrecht (Basel, 1900); Rechtssubject und Nutzbefugnis (Basel, 1901); Die Körpershaft mit und ohne Persönlichkeit (Basel, 1904); De Vareilles-Sommières, Les Personnes Morales (Paris, 1902); Michoud, La Théorie de la Personnalité Morale (two volumes. Paris, 1906 and 1909); Pic, Sociétés Commerciales, vol. 1, title II, ch. 1 (Paris, 1908); Ferrara, Le Persone Giuridiche (Naples, 1907–1910); Barillari, Sul Concetto della Persona Giuridica (Rome, 1910).

is impossible to do more than make brief mention of some of the leading theories,[4] as an introduction to an examination of the subject on principle.

I.

The Roman law gave but little consideration to what we call corporations, and the whole law of the subject consisted in a number of ambiguous and unfortunate phrases which have been the sources of much of the confusion both in English law and in the law of Continental Europe. The canon law, while it devoted more consideration to the subject, did not develop any well defined theory. In spite of the scholastic flavor of the *dicta* on the subject transmitted to us by Coke, the Canonists cannot fairly be charged with originating the confusion surrounding the subject.

Savigny in Germany, in the first half of the nineteenth century, began the scientific or metaphysical consideration of the subject. He observed the fact that property belongs in law to a corporation and not to any individual, and the question which he put to himself was, "Who or what is the real owner of this property?" With this question theoretical writers in Germany and elsewhere have ever since busied themselves. Savigny's answer was that the corporate property belonged to a fictitious being and not to any real person or entity. He took as his starting-point the proposition that ownership involves the possession of a will by the owner; and he concluded that inasmuch as a corporation does not really possess a will, it must as a property-owner be a fictitious person. At the same time, as an acute French writer has demonstrated, Savigny and his followers, paradoxical as it may seem, impute a certain reality to this fictitious person.[5] For instance, they speak of it as created by the state.

Savigny's doctrine, or some doctrine closely akin thereto, was generally accepted in France from his time until quite recently; and all students of the common law will recognize in this theory the most prominent features of the orthodox doctrine of Anglo-American law — even including its self-contradictions.

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[4] See historical review in Binder, Das Problem der juristischen Persönlichkeit, 1–34; Michoud, La Théorie de la Personnalité Morale, 16–99; Ferrara, Le Persone Giuridiche, 22 *et seq.*

[5] De Vareilles-Sommières, Les Personnes Morales, ch. II.

In Germany, however, objections began to be raised to this theory almost as soon as it was definitely formulated. Accordingly, a school arose, led by Brinz, which taught that corporate property is not owned by a fictitious being created by the state but by no person at all. It is not the property of a person but of a purpose — "*Zweckvermögen.*" This theory was primarily intended to explain the ownership of property by charitable foundations. Although Brinz has found few followers, yet his theory undoubtedly contains an element of truth; for the property of every corporation, not merely charitable corporations but also business companies, is in a sense dedicated to an object. But we of the common law recognize in such dedication, not the ownership of the property by an object, but rather the elements of a somewhat peculiar trust. The purpose to which such property is dedicated amounts to a mere restriction on the otherwise more extensive right of disposition enjoyed by those who manage the property.

This "Zweckvermögen" theory, like that of Savigny, regarded the personality of corporations as fictitious; but in the meantime a rival school arose, which teaches that corporations are real persons. This personality is neither fictitious, nor artificial, nor created by the state, but both real and natural, recognized but not created by the law. When a company is formed by the union of natural persons, a new real person, a real corporate "organism," is brought into being. Of this school, which in some form or other has long been dominant in Germany, Gierke is the leading exponent. In the hands of some writers, this doctrine is carried to grotesque lengths. The corporate organism is an animal: it possesses organs like a human being. It is endowed with a will and with senses. It even possesses sex: some corporate organisms, like the church, are feminine, while others, such as the state, are masculine. One opponent of this doctrine ironically propounds the question whether a marriage with a legal person is valid.[6] Of course, in the hands of most writers, this reality theory of corporate personality is much more refined. For instance, Gierke himself has a much less anthropomorphic conception of the corporate organism. Some writers make the real corporate organism a mere colorless, lifeless "subject of rights." Some, with Zitelmann, hold that the corporate organism possesses a will, and is for that reason a real person. Others

[6] De Vareilles-Sommières, Les Personnes Morales, pp. 77–78.

assert that a corporation has no will, but that a will is not essential to personality.

Some writers, notably Ihering in Germany, M. de Vareilles-Sommières in France, and Schwabe in Switzerland, have rejected all the foregoing views. They teach that the "subject of rights" in cases of corporate ownership of property is simply the natural persons who compose the entity. They concur with the advocates of the fiction theory in maintaining that the personality of a corporation, or even its existence as an entity, is a pure fiction or metaphor; but they maintain that the fictitious personality is not "created" by the state, because it does not exist. To them, a corporation is merely an abbreviated way of writing the names of the several members.

When we turn homeward from these foreign theories, we find that no English or American lawyer has philosophized about the question, although the orthodox doctrine in this country is similar to Savigny's and is, like his, full of self-contradictions. The orthodox American lawyer would be apt to say, "A corporation is a fictitious, artificial person, composed of natural persons, created by the state, existing only in contemplation of law, invisible, soulless, immortal." Now, such a definition is a *congeries* of self-contradictory terms. For example, a corporation cannot possibly be both an artificial person and an imaginary or fictitious person. That which is artificial is real, and not imaginary: an artificial lake is not an imaginary lake, nor is an artificial waterfall a fictitious waterfall. So a corporation cannot be at the same time "created by the state" and fictitious. If a corporation is "created," it is real, and therefore cannot be a purely fictitious body having no existence except in the legal imagination. Moreover, a corporation cannot possibly be imaginary or fictitious and also composed of natural persons. Neither in mathematics nor in philosophy nor in law can the sum of several actual, rational quantities produce an imaginary quantity. As, therefore, the orthodox doctrine contains so many mutually contradictory propositions, it behooves us to study the question on principle.

II.

What, then, is the corporate entity? Is it real or imaginary? Is it natural or artificial? Is it "created by the state," or does

it spring into existence spontaneously? Is it a person or is it not?

The difficulties of the inquiry are manifold; for the most abstruse questions of philosophy become pertinent. At the very outset, we are confronted by Pilate's question, "What is truth?" or by the cognate question, "What is reality?" For certainly we cannot well determine whether the corporate entity is real, unless we first decide what reality is. For instance, an idealist, who believes that chairs and tables have no existence save in his own mind, is very apt to impute to the ideal corporate entity the same degree of reality — neither greater nor less — which he attributes to such material objects. So, the question whether, or in what sense, a corporation is a person, naturally involves an inquiry into the nature of personality, than which no more profound or baffling question can be conceived. In such metaphysical mazes it is easy to lose one's self.

Now, in respect to the nature of a corporation, there are two basic propositions, (1) that a corporation is an entity distinct from the sum of the members that compose it, and (2) that this entity is a person. These propositions are often confused; but they are properly quite distinct from one another. For example, one who denies that a corporation is really a person, or who accepts that proposition merely as a figurative statement or fiction of law, is not at all bound by logical consistency to deny the reality of the corporation as an entity distinct from the sum of the members.[7]

III.

Let us, therefore, address ourselves first of all to the question whether, or in what sense, a corporation is an entity distinct from the sum of the members.

Now, consider for a moment any composite whole. Is a house

[7] See De Vareilles-Sommières, Les Personnes Morales, sec. 232, where the author says: "Remarquons tout d'abord que, s'il était vrai que l'association fût quelque chose d'autre que ses membres, s'il était vrai que le tout fût quelque chose de plus que les associés, il ne s'en suivrait nullement que cette chose, ce tout, fût une personne. Où est le lien entre ses deux idées: les associés forment un tout; ce tout est une personne? Il y a un abîme entre elles. . . . Pour le combler, il faudrait y jeter cette majeure avec ses preuves: un tout composé de différents individus d'un certain ordre est toujours lui-même un individu du même ordre."

merely the sum of the bricks that compose it? This question cannot well be answered in the affirmative; for you may change many of the bricks without changing the identity of the house. Or take such a common word as "bundle." Every child recognizes that the "bundle" is something distinct from the faggots, or what not, which compose it. When you have the separate faggots, you do not have the bundle; and you may change the faggots, or many of them, without destroying the identity of the bundle.

To come still closer to the subject, take such a simple idea as "school" or "church." Was there ever a schoolboy who had any difficulty in understanding that his school is something distinct from the boys that constitute it? He does not need to be told that the school may preserve its identity after a new generation of boys have grown up, so that not a single pupil remains the same, and though every teacher may have changed and though the school building may have been moved to a different location. He finds nothing strange or mystical in the conception of the school as an entity. Similarly, he needs no theological instruction, still less any metaphysical disquisition about the nature of an imaginary entity, to inform him that the Church is the same church to-day as in the days of our Lord. Was there ever a pupil in a Sunday School who asked for explanation of the doctrine of "One Catholic and Apostolic Church" on the ground that every time there is a change in membership there must be a new church? On the contrary, much instruction would be required to make a healthy boy believe that the school or the Church is a short-hand expression for the several members of the school or of the Church, so that every time a new boy joins the school or a new member joins the Church, there is a new school or a new Church.

Any group of men, at any rate any group whose membership is changing, is necessarily an entity separate and distinct from the constituent members.[8] The naturalness and indeed inevitableness of the conception of a corporation as an entity was pointed out by Mr. Morawetz:

[8] This may be demonstrated mathematically. Suppose a corporation composed of two members, a and b. Let c = the corporate entity. Now, if the corporate entity is merely the equivalent of the sum of the members, then $c = a + b$. Now, suppose b to assign his shares to d, then $c = a + d$. But this cannot be unless b is the same as d, which is absurd. Therefore, c, the corporate entity, is not equivalent to the sum of the members.

"The conception of a number of individuals as a corporate or collective entity occurs in the earliest stages of human development, and is essential to many of the most ordinary processes of thought. Thus, the existence of tribes, village communities, families, clans, and nations implies a conception of these several bodies of individuals as entities having corporate rights and attributes. An ordinary copartnership or firm is constantly treated as a united or corporate body in the actual transaction of business, though it is not recognized in that light in the procedure of the courts of law. So, in numberless other instances, associations which are not legally incorporated are considered as personified entities, acting as a unit and in one name; for example, political parties, societies, committees, courts." [9]

All that the law can do is to recognize, or refuse to recognize, the existence of this entity. The law can no more create such an entity than it can create a house out of a collection of loose bricks. If the bricks are put together so as to form a house, the law can refuse to recognize the existence of that house — can act as if it did not exist; but the law has nothing whatever to do with putting the bricks together in such a way that, if the law is not to shut its eyes to facts, it must recognize that a house exists and not merely a number of bricks.

Hence, it follows that in recognizing the existence of a corporation as an entity, the law is merely recognizing an objective fact, while in refusing to recognize fully the existence of a partnership or voluntary association as an entity the law is shutting its eyes to facts. Therefore, what needs explanation in the common law is not the doctrine that a corporation is an entity, but the doctrine that a partnership or other voluntary association is *not* an entity. It is all but impossible for those unlearned in the law to think of a partnership otherwise than as an entity. It is hard to convince a sensible business man that when a senior partner gives his son on attaining majority a small interest in the firm, an entirely new firm is thereby created. The ordinary layman has the conception of the firm as an entity; and confusion and litigation arise because the Anglo-American law will not recognize, or will not fully recognize, that simple conception.

Hence, the oft repeated statement of lawyers and judges that a corporation exists *only* in contemplation or intendment of law [10] is

[9] Morawetz, Private Corporations, 2 ed., § 1.

[10] Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 636; Sutton's Hospital Case, 10 Co. 32.

untrue. A corporation exists as an objectively real entity, which any well-developed child or normal man must perceive: the law merely recognizes and gives legal effect to the existence of this entity. To confound legal recognition of existing facts with creation of facts is an error, — none the less serious because the law sometimes, ostrich-like, closes its eyes to facts and assumes that they have no existence. For instance, the common law refused to recognize the paternity of an illegitimate child and declared him to be *filius nullius;* but it did not follow that the parentage of children born in wedlock existed *only* in contemplation of law. In that case, the law recognized facts; in the other it refused to do so. Similarly, although the law stubbornly blinks at the facts when it will not acknowledge the existence of a partnership or voluntary association as an entity, it does not follow that a corporation as an entity exists *only* in intendment of law. Because Nelson at Copenhagen would not see the signal to retreat, it did not follow that everything that he did see — the enemy's vessels and his own — existed *only* in his own mind.

We need not waste words in discussing the nature of the existence of this corporate entity. Its existence is precisely as real as the existence of any other composite unit. As Kyd, a writer who deserves a greater reputation than he enjoys, clearly stated, "A corporation is as visible a body as an army; for though the commission or authority be not seen by every one, yet the body, united by that authority, is seen by all but the blind." [11] If a corporation is fictitious, the only reality being the individuals who compose it, then by the same token a river is fictitious, the only reality being the individual atoms of oxygen and hydrogen. The only difference is that one of the essential elements of an army, or of a river, consists in juxtaposition in space of the members, or of the molecules of water, whereas the bond of union in the case of a corporation is less material. But this difference is not at all fundamental; and the existence of a corporation is quite as real as the existence of the Church, of the Republican Party, or of any other aggregation of men for good or evil. Whether this existence be ideal or material, it is certainly real.

In these days, it has become rather fashionable to inveigh against the doctrine that a corporation is an entity, as a mere technicality

[11] 1 Kyd, Corporations, 16.

and a relic of the Middle Ages; but nothing could be further from the truth. A corporation is an entity — not imaginary or fictitious, but real, not artificial but natural. Its existence is as real as that of an army or of the Church. This is the element of truth in the reality theory of corporate personality which, originating in Germany, has commanded wide acceptance not only in that country but also in France and Italy.

IV.

Having thus established that a corporation is a real and natural entity, recognized but not created by the law, we next encounter the question whether this entity is a person. The answer to this question is, of course, vitally affected by our definition of "person." If we use the word in the signification which it conveys to the ordinary English-speaking layman, undoubtedly the corporate entity is not, in truth and reality, a person. For the corporate entity is not a human being; it is not even a rational creature capable of feeling and willing. But the word may be used in some very different sense. "When *I* use a word," said Lewis Carroll's Humpty Dumpty, "it means just what I choose it to mean — neither more nor less"; and when Alice objected, "The question is whether you *can* make words mean so many different things," Humpty Dumpty replied, "The question is which is to be master — that 's all." Many a German scholar has resolved, like Humpty Dumpty, that words shall not master *him*, and having thus impressed upon the word "person" his own meaning he demonstrates with absolute finality that the corporate entity is really a "person" — in *his* sense of the word.

Certain it is, however, that if the word is thus used in a special, non-popular sense, the proposition that a corporation is a person becomes a mere source of confusion. If by "person" the law means, not a rational, living creature similar to a man but a mere "subject of rights," — and this is the teaching of the more moderate members of Gierke's school [12] — then, in the name of clearness let us adopt some less ambiguous designation for this "subject of rights."

[12] See, Michoud, La Théorie de la Personnalité Morale, 7: "Pour la science de droit, la notion de personne est et doit rester une notion purement juridique. Le mot signifie simplement un sujet de droit, un être capable d'avoir des droits subjectifs lui appartenant en propre, — rien de plus, rien de moins."

But if we do not lose ourselves in metaphysical discussions of the nature of juristic personality but take common sense as our guide, we shall apprehend clearly that when a jurist first said, "A corporation is a person," he was using a metaphor to express the truth that a corporation bears some analogy or resemblance to a person, and is to be treated in law in certain respects as if it were a person, or a rational being capable of feeling and volition.

That the *dictum*, "A corporation is a person" really means what we have just stated and not that a corporation is a "subject of rights" can easily be demonstrated. For true it is that there are or may be subjects of rights which are not beings capable of feeling and volition, but they are not persons in any proper sense of the word. For instance, laws for the prevention of cruelty to animals recognize the lower animals as possessing a somewhat vague right to exemption from needless suffering. The law might go further: it might, for instance, recognize a trust for the maintenance and support of the testator's dogs or horses, and might permit of the enforcement of this right of those animals by a judicial proceeding in their names by *prochein ami*, in precisely the same way that the right of an infant *cestui que trust* would be enforceable; but the horses and dogs would not on that account be persons. Anything that is capable of enjoyment or feeling can be a subject of rights — a "*Geniesser*" as Bekker would say. Indeed, we may go further; for even a purely imaginary being may have legal rights. For example, our law recognizes and enforces trusts for the benefit of unborn children. So, a heathen code might recognize a right of Jupiter or Apollo to enjoy the sweet savour of a hecatomb or a burnt offering, and might enforce this right by judicial proceedings instituted in the name or on behalf of the divinities in question; and yet those deities, although "subjects of rights," would not be real persons.

The truth is that the essence of juristic personality does not lie in the possession of rights but in subjection to liabilities. Those beings are "persons" in law to whom the law both can and does address its commands. Now, obviously, legal commands can be addressed to none but rational beings capable of feeling and volition. To all else, the law's commands, if addressed at all, must remain unintelligible and mere *brutum fulmen*. It needs no Canute to teach us that the sovereign's commands when addressed to the waves of the sea, or for that matter to aught but rational beings, are futile.

The essential prerogative of man does not lie in rights, but in duties. Every system of law, from the Decalogue down, is founded upon thou-shalt-not's, addressed to beings capable of understanding the command, of feeling the penalty, and of exercising a will to act accordingly. It cannot be otherwise. No fiction can supply these essential elements of juristic personality: no law can create them. The only way the law can protect or enforce legal rights is by imposing punishment upon those who violate them — an idle proceeding unless the violator is a moral being capable of being deterred by the threat of punishment.

It will be objected that this conception of personality would exclude idiots and infants. So it would; but what of it? In our ignorance of the nature of the mind or soul, we do not know where the mind of an idiot or an infant is situated, or whether it exists at all; but certain it is that for all legal purposes the mind of an idiot or an infant of tender years is as if it did not exist. We speak of idiots as persons because they have the form of persons; but we recognize that the substance is not there. If society consisted exclusively of idiots or babes, there could be no law. They are persons only in form and *in posse*.

It will also be objected that the conception of legal personality stated above is too broad in that it would admit the legal personality of slaves. Now, we must concede that the law *might* refuse to recognize the personality of some classes of rational beings who are really capable of feeling and volition, just as we have seen that the law sometimes refuses to recognize the existence of facts, — for example, in the denial of the paternity of illegitimate children. The law *might* refuse to recognize certain classes of rational men as subject to legal duties; but few if any systems of law have been so silly. The law finds difficulty enough in securing obedience to its commands without unnecessarily hampering itself by refusing to address them to some beings who by nature are capable of understanding and obeying them. For example, although the law of the Southern States declared with emphasis that slaves were not persons, and deprived them of many of the rights usually enjoyed by persons, nevertheless it left them subject to legal duties. For instance, if a slave committed murder, he could be hanged. When the law declared that a slave was not a person, it meant merely that he was to be treated for some purposes as if he were not a person.

As a corporate entity is not a rational being, is not capable of understanding the law's commands, and has no will [13] which can be affected by threats of legal punishment, it follows — if demonstration be needed of a self-evident fact — that a corporation is not a real person, if the word "person" be used in its ordinary sense. In addressing commands to a corporation, the law can speak only to the human beings who compose it or who manage and control its destinies. In form, punishment for violation of those commands may be inflicted on the corporate entity, but in so doing the law is using the corporate entity as a mere means of reaching the human beings who act for the corporation. Whether this method of reaching those human beings is the best or most effective need not now be considered. The point here is that in denouncing its penalties upon corporations, the law is using the corporate entity as a mere sight to direct its shots towards the human beings who are behind the entity. This is the truth epigrammatically expressed in American politics by the phrase, "Guilt is personal."

So too, even in respect to rights attributed to the corporate entity, the object of the law is to carry those rights to the human beings who, collectively, compose the corporation and constitute, according to a foreign expression, its *substratum*. For although, as we have seen, the law *might* recognize other beings than men as possessors of rights, yet in fact neither our law, nor any existing system of law, does do so, except to a very limited extent. The law, as already mentioned, does recognize, and punish the infraction of, certain very imperfect rights possessed by the lower animals, and it does recognize and enforce rights of unborn children. But in the broad and large sense, the Declaration of Independence states an undeniable fact when it asserts that governments are instituted *among men* — not among animals or angels, but men — and that it is men whose inalienable rights to life, liberty and the pursuit of happiness the laws attempt to secure. Corporations are created, or allowed to be formed, by the state merely for the purpose of benefiting human beings.[14]

[13] Note, however, that Zitelmann maintains that a corporation possesses an "einheitlichen Willen," or "Verbandswillen." Binder, Das Problem der juristischen Persönlichkeit, 22–23, criticising Zitelmann's theory on the ground that this will is of a very different character from the will of a person in the ethical sense. See also passage from Macaulay to be quoted in the continuation of this article.

[14] Ihering makes this proposition the basis of his conclusion that the real subject of rights is not the corporation but the individual members. "Niemand wird darüber im

For the rights of ideal entities, as such, the state has no concern. In the last analysis, it is men and not legal entities whose rights and liabilities the courts must decide. The corporate entity, or personification, which we call a corporation is regarded as having rights and liabilities for the sake of convenience; but it is men of flesh and blood, of like passions with ourselves, who must in one form or another and in varying degrees enjoy the rights and bear the burdens attributed by the law to the corporate entity.

Therefore, the proposition "A corporation is a person" is either a mere metaphor or is a fiction of law. This is the element of truth in the "fiction theory" of the corporate entity which both in England and on the Continent may be regarded as the orthodox doctrine.

But although corporate personality is a fiction, the entity which is personified is no fiction. The union of the members is no fiction. The acting as if they were one person is no mere metaphor. In a word, although corporate personality is a fiction, yet it is a fiction founded upon fact. It is as natural to personify a body of men united in a form like that of the ordinary company as it is to personify a ship. To argue that because the personality of a corporation is a product of the imagination, therefore the corporation itself, as anything different from the separate members, is a fiction would be as reasonable as to argue that because a ship is not really a female, and is personified only by way of metaphor, therefore it has no real existence except as a number of boards and nails.

To appreciate the difference between an imaginary personality, such as that of a corporation, which is a natural and spontaneous expression in figurative language of actual facts, and a purely fictitious person, whose existence is no mere personification of a real but impersonal entity, it is only necessary to refer to some purely fictitious personalities. For there are, or have been, fictitious personalities existing *only* in contemplation of law; but they are very different from corporations. The fictions in ejectment present the best example. John Doe, the common lessee, and Richard Roe, the

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Zweifel sein, dass die einzelnen Mitglieder es sind, denen die Rechte, mit denen die juristische Person ausgestaltet ist, zugute kommen, und dass diese Wirkung nicht eine zufällige ist, sondern dass sie den Zweck des ganzen Verhältnisses bildet, dass also die einzelnen Mitglieder die wahren Destinatäre der juristischen Person sind." Ihering, Geist des römischen Rechts, III, 356, quoted by Binder, Das Problem der juristischen Persönlichkeit, 25.

casual ejector, exist only in contemplation of law. They are pure legal fictions. They represent no natural idea. They are no mere personification by the law of real entities, but are forthright creations of the legal imagination. They cannot, like corporations, bridge rivers, pierce mountains, unite cities, cross seas, control commerce, and accomplish all manner of other visible and tangible results. Yet, so misleading are the standard definitions of a corporation that they are more justly applicable to such truly fictitious persons as John Doe and Richard Roe than to the very real things which we call corporations. For instance, Chief Justice Marshall's famous definition of a corporation,[15] with the substitution of the masculine gender for the neuter gender and of the word "law" for "charter," accurately defines John Doe or Richard Roe. The common lessee, the definition would then read, is "an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, he possesses only those properties which the law of his creation confers upon him, either expressly or as incidental to his very existence. Those are such as are supposed to be best calculated to effect the object for which he is created." Are we therefore to conclude that the only difference between John Doe and a corporation is one of sex? No conception of the corporate entity which would define it in terms appropriate to the casual ejector or the common lessee can be correct.

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[*To be continued.*]

[15] Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 636.

ADMINISTRATIVE EXERCISE OF THE POLICE POWER.

IN legislation passed in the exercise of the so-called police power, measures designed to protect the health and safety of the people, it is conceivable that the legislature might ascertain in advance the qualifications necessary for those engaged in any calling or the conditions essential to guard against danger and disease, and set forth in the statute specific requirements of regulation or prohibition. But the progress of scientific knowledge is so rapid that the requirements of any statute might soon prove less adequate than other measures suggested by a more expert body. Moreover, any general rule declared by the legislature would be too inflexible to conform to the varying necessities of different areas of population, or to meet exigencies unforeseen at the time the statute is passed.

The most salutary exercise of the police power is that which seeks to forestall the advent of danger, not merely to avert its consequences. This is best attained by requiring the presence of certain personal qualifications or physical conditions as a prerequisite to the lawfulness of any action sought to be taken. The inquiry as to compliance with requirements is a task obviously unsuited to the legislature. And the function of the judiciary is properly limited to determining in cases and controversies whether any rule has been violated. And when health or safety are threatened by dangerous conditions or practices, adequate protection demands that they cease forthwith. The community cannot await the slow course of judicial proceedings.

The legislature has therefore often seen fit to delegate to administrative authorities the power to set forth the further requirements necessary to effectuate the general purpose declared by the statute, and to ascertain in individual instances whether the requirements have been met, and, if necessary, to take summary and immediate action to avert or minimize the threatened or actual danger. The

power to act in all these instances has been repeatedly sustained, in spite of the objection that it involves the exercise of legislative or judicial functions.[1]

I.

Precautionary Regulation.

It is obvious that anything which might be prohibited entirely may be subjected to governmental supervision and restriction. And many acts or conditions not necessarily pernicious in themselves may be regulated as a precaution against the dangers involved in inefficiency, unwholesomeness and excess. The government and its agents are accorded a wider latitude in exercising a qualified restraint, than in enforcing complete prohibition or direct and positive interference with liberty or property.

This restraint commonly takes the form of limiting the exercise of some calling or business to those persons or premises specially licensed. The exercise of this power involves the selection of the acts or objects to be regulated, the fixing of a standard, and the decision whether in individual instances the requirements of the standard have been met. The latter task is necessarily an administrative one; and the two former, while they might conceivably be performed by the legislature, are quite generally delegated to administrative authorities, owing to the peculiarity of urban conditions and the superior technical knowledge of experts.

A license as an official affirmation of personal fitness or approved physical conditions must be distinguished from a license which is merely the acknowledgment of the payment of a tax. Callings, occupations and businesses are proper subjects of taxation; and the method of collection may take the form of the denial of the right to proceed until payment of the tax is evidenced by a so-called license. In such cases the only reason for denying the license is the non-payment of the tax. But where the license is required as a police regulation, it may be withheld because the personal qualifications or physical conditions do not meet the requirements of the standards imposed. While it is proper to exact a fee to cover the expense of supervision, the courts will hold invalid any exaction

[1] Blue *v.* Beach, 155 Ind. 121 (1900); People *v.* Hasbrouck, 11 Utah 291 (1895); State *v.* Hathaway, 115 Mo. 36 (1892).

of money manifestly for the purpose of securing revenue, unless there is present both the intent as well as the power to tax. In a case where a license was required solely as a police measure, and a dispute arose as to the validity of the exaction of a fee and the proper person to be charged, a board which had expressed its willingness to examine relator as to his qualifications for locomotive engineer, but had stated that it would not issue a license without payment of the fee, was ordered by *mandamus* to admit him to examination, and if found qualified to issue the license.[2]

The power to regulate must be used for the purpose of regulation. An ordinance requiring department stores to be licensed, which imposed a fee but provided no regulation or supervision, was held invalid as a police measure.[3] The court seemed to doubt whether department stores are proper subjects for regulation. The selection of such subjects is a matter over which they retain control. It has been held that the requirement that horse-shoers must have three years' experience and pass an examination bears no relation to public health, comfort, safety or welfare.[4] And a statute vesting in an administrative board the power to determine who should be permitted to sell patent and proprietary medicines was held unconstitutional on the ground that the public health did not require that the sale of such articles be confined to persons with scientific attainments.[5]

The problem of judicial censorship over the subjects selected for regulation and the standards which may be required is one pertaining to the limits of the police power generally; though the courts may concede a wider latitude to the legislature as a coordinate department of government than would be accorded to an inferior administrative authority. In general, the licensing power may be exercised with respect to any business affording the possibility of practices or conditions inimical to health and safety, or to any calling requiring the exercise of expert skill or knowledge to avoid improper action necessarily prejudicial to those interests which it is the duty of the state to protect.

Governmental supervision may be aimed at confining the exer-

[2] Baldwin *v.* Kouns, 81 Ala. 272 (1886).
[3] State *ex rel.* Wyatt *v.* Ashbrook *et al.*, 154 Mo. 375 (1899).
[4] Bessette *v.* The People, 193 Ill. 334 (1901).
[5] Noel *v.* The People, 187 Ill. 587 (1900).

cise of a calling to individuals personally qualified or to physical conditions deemed safe and sanitary. Among the acts held properly subject to regulation in order to secure the latter end, are the storing of gunpowder,[6] or inflammable and explosive oils,[7] the blasting of rock,[8] the erection of proposed buildings,[9] or bill-boards,[10] the operation of slaughter-houses,[11] hotels,[12] livery stables,[13] laundries,[14] and nurseries for trees and plants,[15] the peddling of milk,[16] and the sale of milk,[17] meat[18] and provisions generally.[19]

Among the callings where personal fitness may be required we find those of physicians,[20] dentists,[21] pharmacists,[22] engineers,[23] mine inspectors,[24] plumbers,[25] barbers [26] and guides.[27]

The power may be exercised not only to protect health and safety, but also to guard against fraud and immorality. For this

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[6] Williams *v.* Augusta, 4 Ga. 509 (1848).

[7] Richmond *v.* Dudley, 26 N. E. 184 (1891); Scranton *v.* Jermyn Oil Co., 5 Lanc. L. Rev. 277 (Pa. 1888).

[8] Commonwealth *v.* Parks, 155 Mass. 531 (1892).

[9] Hasty *v.* City of Huntington, 105 Ind. 540 (1886); Com'rs of Easton *v.* Covey, 74 Md. 262 (1891); State *v.* Sharkey, 49 Minn. 503 (1892); State *v.* Johnson, 114 N. C. 846 (1894).

[10] City of Rochester *v.* West, 164 N. Y. 510 (1900).

[11] Crescent City Live Stock Co. *v.* Butchers Union Live Stock Co., 111 U. S. 746 (1883); St. Louis *v.* Howard, 119 Mo. 41 (1893).

[12] Russellville *v.* White, 41 Ark. 485 (1883); Holland *v.* Pack, Peck (Tenn.) 151 (1823); State *v.* Stone, 6 Vt. 295 (1834); Stanwood *v.* Woodward, 38 Me. 192 (1854).

[13] 33 Cent. Dig., columns 1492, 1493.

[14] *In re* Yick Wo, 68 Cal. 294 (1885).

[15] *Ex parte* Hawley, 115 N. W. 93 (S. Dak. 1908).

[16] People *v.* Mulholland, 82 N. Y. 324 (1880).

[17] People *v.* Vandecarr, 175 N. Y. 440 (1903).

[18] Kinsley *v.* Chicago, 124 Ill. 359 (1888); Porter *v.* City of Water Valley, 70 Miss. 560 (1893); Ash *v.* The People, 11 Mich. 347 (1863).

[19] Thomas *v.* Town of Mount Vernon, 9 Oh. 290 (1839).

[20] Dent *v.* West Virginia, 129 U. S. 114 (1889); Reetz *v.* Michigan, 188 U. S. 505 (1903); People *v.* Hasbrouck, 11 Utah 291 (1895); France *v.* The State, 57 Oh. St. 1 (1897); State *ex rel.* Burroughs *v.* Webster, 150 Ind. 607 (1898).

[21] State *v.* Creditor, 44 Kan. 565 (1890); Gosnell *v.* The State, 52 Ark. 228 (1889); State *v.* Vandersluis, 42 Minn. 129 (1889); Wilkins *v.* State, 113 Ind. 514 (1887).

[22] State *v.* Heineman, 80 Wis. 253 (1891); Noel *v.* The People, 187 Ill. 587 (1900).

[23] McDonald *v.* The State, 81 Ala. 279 (1886); Smith *v.* Alabama, 124 U. S. 465 (1888); Nashville, etc. R. R. Co. *v.* Alabama, 128 U. S. 96 (1888).

[24] Wilmington Star Mining Co. *v.* Fulton, 205 U. S. 60 (1906).

[25] Singer *v.* State, 72 Md. 464 (1890); People *v.* Warden of City Prison, 144 N. Y. 529 (1895); Douglas *v.* The People, 225 Ill. 536 (1907).

[26] State *v.* Zeno, 79 Minn. 80 (1900); State *v.* Sharpless, 71 Pac. 737 (Wash. 1903).

[27] State *v.* Snowman, 94 Me. 99 (1900).

reason it is held that the privilege of book-making and pool-selling may be limited to persons found to be of good character.[28] Such provisions are of course sustained in regulating any calling, such as the liquor traffic, which may be prohibited entirely. And even with respect to other callings, having no necessary flavor of evil, the power to license is upheld, though the qualifications required are of a moral rather than an intellectual nature. Licenses are demanded of private detectives,[29] pawnbrokers,[30] junk-dealers and dealers in second-hand goods,[31] auctioneers,[32] book-canvassers,[33] and hawkers and peddlers.[34] Sometimes the inquiry preliminary to the granting of a license will relate to the conditions of the place of business as well as to the qualifications of the one seeking permission. This would be true as to the sale of liquor, the conduct of a billiard hall[35] or other place of amusement,[36] and of warehouses.[37]

Sometimes the precautionary measures of administrative authorities extend beyond mere inspection to positive interference. The courts have sustained an ordinance requiring all second-hand clothing to be fumigated by public authorities at the expense of the owner,[38] and a statute requiring all rags to be disinfected, whether actually infected with disease or not, where the danger was thought too great to permit of discrimination.[39] The same reason justifies compulsory vaccination.

The acts and businesses subjected to regulation are far more numerous than any list to be gleaned from judicial decisions; for

[28] State *v.* Thompson, 160 Me. 333 (1900).

[29] *In re* Burnett's Application, 5 Pa. Dist. R. 3 (1895).

[30] Launder *v.* Chicago, 111 Ill. 291 (1884).

[31] Grand Rapids *v.* Brandy, 105 Mich. 670 (1895).

[32] People *ex rel.* Schwab *v.* Grant, 126 N. Y. 473 (1891).

[33] Borough of Warren *v.* Geer, 117 Pa. St. 207 (1887).

[34] State *v.* Harrington, 68 Vt. 622 (1896); Duluth *v.* Krupp, 46 Minn. 435 (1891); Commonwealth *v.* Gardner, 133 Pa. St. 284 (1900); Morrill *v.* State, 38 Wis. 428 (1875).

[35] *In re* Snell, 58 Vt. 207 (1885).

[36] Wallack *v.* City of New York, 3 Hun (N. Y.) 84 (1874).

[37] Cargill Co. *v.* Minnesota, 180 U. S. 452 (1900). And for protection against fraud in sales, weights and measures may be required to be proved and sealed by a public inspector. People *ex rel.* Gould *v.* Rochester, 45 Hun (N. Y.) 102 (1887). The use of uninspected standards has been held a defense in an action for the price of goods sold. Bisbee *v.* McAllen, 39 Minn. 143 (1888); Smith *v.* Arnold, 106 Mass. 269 (1871).

[38] Rosenbaum *v.* Newbern, 118 N. C. 83 (1896).

[39] Train *v.* Boston Disinfecting Co., 144 Mass. 523 (1887).

many statutes and ordinances have been long enforced without being questioned in the courts.[40]

It is to be noted that even where supervision and the requirement of a license are not deemed improper, ordinances regulating useful callings have been declared invalid on account of discriminations in favor of certain classes or individuals which bear no relation to the fitness of those exempted from the examination or inspection required of others.[41] A regulation which required a license for all electricians except those employed by the city in its departments of police and public buildings, and those employed by lighting and electric railway companies in the installation and maintenance of meters and pole-line service, was held void on the ground of discrimination, where the court was of opinion that the work of those excepted possessed the same elements of danger as that of those required to be examined.[42] While it has been held proper to divide engineers into four classes according to the character of the work in which they are engaged, with different qualifications for each class,[43] a regulation which required an examination of journeymen plumbers but permitted master plumbers to be registered without examination was declared invalid for lack of uniformity.[44]

The administrative action in establishing the standard set forth as a condition of obtaining the license, like the administrative selection of the subjects to be regulated, is open to judicial review. The court has doubted the legality of a requirement that no medical school would be put on the accepted list if it permitted more than forty-five per cent of its matriculants to graduate,[45] and has held unreasonable and void the requirement that applicants for a plumber's license must possess a knowledge of physics and hygiene.[46] The right to conduct a nursery from which to sell plants and trees cannot be conditioned on establishing that the applicant is "responsible," in the sense that he is financially able to pay damages for bad stock sold.[47] It was said that a man cannot be denied the

[40] See Freund, Police Power, sec. 493, for review of statutory requirements of recent years.

[41] State *v.* Gardner, 58 Oh. St. 599 (1888); Harmon *v.* State, 66 Oh. St. 249 (1902).

[42] State *v.* Gantz, 124 La. 535 (1909).

[43] Hyvonen *v.* Hector Iron Co., 103 Minn. 331 (1908).

[44] Commonwealth *v.* Shafer, 32 Pa. Super. Ct. 497 (1907).

[45] Iowa Eclectic Medical College Ass'n *v.* Shrader, 87 Ia. 659 (1893).

[46] United States *ex rel.* Kerr *v.* Ross, 5 D. C. App. 241 (1895).

[47] *Ex parte* Hawley, 115 N. W. 93 (S. Dak. 1908).

right to sell his trees because he is poor, as poverty is no indication of dishonesty. In a decision sustaining the refusal of a license to practice medicine because of deceptive advertising, the court observed that "unprofessional conduct" must consist in something more than the violation of some code of professional ethics, and indicated that the mere fact of having advertised would be an insufficient ground for denying a certificate, even though such advertising is frowned upon by the profession.[48] In a recent Wisconsin opinion it was observed that there is a wide interval between the ideal and the practical, and that

"common sense as to reasonable requirements and reasonable means of securing such requirements should prevail, not the extreme views of well-meaning persons as to what is for the best. Idealists will often find efforts to force their standards of living upon people generally by legislation barred by constitutional limitations." [49]

It is to be remembered, however, that, in exercising this review, the courts are chary of overruling the standard fixed by the administration. In declining to hold that commissioners had exceeded their discretion in requiring party-walls to be thirteen inches in thickness, Mr. Justice Robb observed:

"In view of the wide latitude of discretion given the commissioners by this act, a plain case of usurpation of power or abuse of discretion must be made before the court would be authorized to interfere." [50]

In another case which sustained as reasonable the administrative ruling that licenses to peddlers of milk would be granted only to those who provide a special room for storing milk and cleansing utensils, the court declared that it would not review the refusal of a license unless facts were alleged showing that the discretion was not honestly exercised in the interest of a pure milk supply, saying:

"The office of an alternative writ, if one were granted, would be to try out in the courts the question as to whether it was good judgment to require milk producers to maintain a separate milk room. This would substitute the opinion of the court for that of the milk officer. It is not

[48] State *v.* State Medical Examining Board, 32 Minn. 324 (1884).
[49] Bunnett *v.* Vallier, 116 N. W. 885 (1908).
[50] United States *ex rel.* Smithson *v.* Ashford, 29 D. C. App. 350 (1907).

desirable or in the public interest that the discretion of the health officer should be so reviewed, and, whether the power to do so exists or not, it ought not, in my opinion, to be exercised in this case." [51]

So also, where the court denied a *mandamus* to coerce the granting of a license where the board had determined that the college from which relator held a diploma was not "reputable," it was said that the methods by which the board should determine the reputability of a dental college not being set forth in the statute, they may do so in any way they deem proper, and that candidates for licenses must submit to their judgments, so long as they are within the boundaries of reason and common sense. "Having once determined the character of a dental college, within all reasonable limits, when and under what circumstances the subject shall be re-opened rests solely in the board's discretion." [52]

With respect to the regulation of those callings requiring expert ability, the Supreme Court has said that the nature and extent of the qualifications demanded must depend primarily upon the judgment of the state as to their necessity, and that if appropriate to the calling and attainable by reasonable study, no objection can be raised to their validity because of their stringency or difficulty. This was applied not only to the right to begin the practice of medicine, but to the privilege of continuing it.[53]

But the qualifications required by statute, and so *a fortiori* by an administrative body, must relate to the subject matter demanding regulation. One cannot be deprived of the right to practice his profession for disqualifications which have no bearing on his fitness to continue therein.[54] Yet the qualifications which relate to fitness are not confined to those of a technical or scientific order, but embrace moral attainments as well. A physician, whatever his scientific attainments, may have his license revoked for employing these faculties perversely.[55]

Under many statutes, however, the administration is not required to establish any standard by which to test the right of an applicant to a license. Each individual case is committed to the

[51] Foote, J., in People *ex rel.* Shelter *v.* Owen, 116 N. Y. Supp. 502 (1909).

[52] State *ex rel.* Coffee *v.* Chittenden, 88 N. W. 587 (Wis. 1902).

[53] Dent *v.* West Virginia, 129 U. S. 114 (1889).

[54] Cummings *v.* Missouri, 4 Wall. (U. S.) 277 (1866); *Ex parte* Garland, 4 Wall. (U. S.) 333 (1866).

[55] Hawker *v.* People, 170 U. S. 189 (1898).

special and unregulated discretion of the board or official. Here obviously the courts cannot review the standard in the subconsciousness of the administration. They are necessarily the final arbiters of the individual right or privilege. For this reason statutes vesting such power are in many jurisdictions declared invalid.

A distinction appears between acts which, though they might possibly be prohibited entirely, yet may be so performed as to give rise to no danger or evil, and those deemed necessarily pernicious, however or wherever sought to be committed. In spite of their evil quality, the law-makers may find universal and complete prohibition inexpedient, and prefer to deny the right to all save those specially selected. The law is clear that, with respect to such acts, this selection and consequent granting of a license may be committed to the unrestrained discretion of an administrative body. The Supreme Court has declared [56] that, since the liquor traffic might be prohibited altogether, there is no inherent right to engage therein, and that therefore the manner and extent of regulation rests entirely in the discretion of the governing authority.

A more difficult question arises with respect to occupations which if properly conducted are confessedly innocuous, where the only source of danger lies in unsanitary conditions or in an excessive number of acts or establishments. In reference to such acts it is asserted by many courts that, though no one may claim the right to follow the given calling or to perform the given acts free from all restraint, each person must be granted permission on complying with certain conditions definitely set forth for his guidance. It has therefore been held improper to make the right to do any lawful act dependent on the mere whim of some administrative board or official, who may in the presence of identical conditions grant the privilege to one and withhold it from another. In Baltimore *v.* Radecke [57] an ordinance prohibiting the erection of a stationary steam engine without the consent of the mayor and council was held void for failure to set forth any conditions controlling the exercise of the discretion to grant or withhold permission. And in Yick Wo *v.* Hopkins,[58] the Supreme Court annulled a similar ordinance relating to the operation of laundries in wooden buildings, and declared:

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[56] Crowley *v.* Christensen, 137 U. S. 86 (1890).

[57] 49 Md. 217 (1878).

[58] 118 U. S. 356 (1886).

"The very idea, that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being of the essence of slavery."

The language of this opinion has been cited in many decisions which have declared statutes and ordinances unconstitutional for making the right to exercise some act, trade or calling, not harmful in itself, dependent on the unrestrained discretion of some administrative authority.

But the Supreme Court has receded from the extreme position announced in Yick Wo *v.* Hopkins, and stated that that decision should be rested on the fact that the administration of the law there indicated actual discrimination against a certain class of individuals.[59] And in Wilson *v.* Eureka City,[60] they sustained an ordinance which prohibited the moving of any building on the streets without the written permission of the mayor, although the ordinance did not prescribe the circumstances by which his discretion in the matter was to be controlled. The court refers to *Re* Flaherty[61] and its summary of the decisions where the exercise of this unrestrained discretion has been held proper. It is true that most of them are instances of the use of the streets or the public parks, where the control of the city is more extensive than over acts done on a man's own premises. But others involved statutes which forbade the keeping of swine without a permit from the board of health,[62] or the erection and repair of buildings without a permit from the designated officials,[63] or made the right to ring bells or blow whistles dependent upon the consent of the board of aldermen.[64]

Some of these acts might doubtless have been forbidden to every one within some defined area; but even as to such we have a square conflict of authority; for the decisions which object to the vesting of unrestrained discretion are based on the ground, not that every one has a right to do the thing for which consent is required, but that where not inherently evil whatever the conditions surrounding

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[59] Crowley *v.* Christensen, *supra*, p. 276.

[60] 173 U. S. 32 (1898).

[61] 105 Cal. 558.

[62] Quincy *v.* Kennard, 151 Mass. 563.

[63] Hine *v.* The City of New Haven, 40 Conn. 478; Commissioners, etc. *v.* Covey, 74 Md. 262.

[64] Sawyer *v.* Davis, 136 Mass. 239.

it, if permitted to one, it must be granted to another on fulfilling the same objective conditions.

In spite of the dangers of favoritism and unjust discrimination, it may be said that unless such statutes are to be sustained, at least with respect to acts which if done too frequently or in too many places would produce manifest harm, it will be necessary to prohibit certain acts or occupations entirely, in order to prevent the danger which would arise from transferring the unrestrained discretion of the administrative authority to the individuals engaged in the enterprise.

After selecting the subjects for regulation and fixing a standard, there remains the further task of ascertaining in individual instances whether the requirements of the standard have been complied with. With respect to the quality of provisions or the condition of the premises where any business is sought to be conducted, the method employed will usually be that of inspection. Where the possession of personal qualifications is in issue, the determination may be reached by examining the candidate to discover his attainments, or by ascertaining whether he has fulfilled the requirements of study or received a previous certificate prescribed by statute or regulations. In Reetz *v.* Michigan [65] it was objected that the power to determine whether one had been legally registered under a prior statute involved the decision of a legal question. But the Supreme Court answered that no provision in the federal Constitution forbids a state from granting to a tribunal, whether called a court or a board or registration, the final determination of a legal question. The statute giving this power to the Board of Registration was sustained although no right of appeal was therein provided. And it is held that the task of determining upon qualifications as to honor and moral fitness may be devolved upon an administrative body.[66] But the applicant is entitled to be heard upon the question.[67]

Where the requirement of a license and the standards imposed are both valid, the receipt of permission is essential to the legality of action taken. It is no defense that the individual does in fact possess the qualifications which would entitle him to a license. The

[65] 188 U. S. 505 (1903).

[66] State *v.* State Medical Board, 32 Minn. 324 (1884).

[67] *Ibid., semble.*

purpose of precautionary regulation would be defeated by allowing every one to be his own inspector, subject to the subsequent approval of a jury. Unlicensed acts are illegal even though a license if requested could not rightfully be denied.[68] One who makes no request for permission can defend his conduct only on the ground that permission could not be required. The determination of qualifications is committed primarily to administrative, not judicial, authorities. The courts will not conduct an original investigation, nor can there be judicial review of an administrative determination which has not been made.

If, however, the board refuse to entertain an application for a license, their consideration of qualifications may be coerced by *mandamus*. The writ has issued to compel the giving of an examination to determine whether relator is entitled to practice law,[69] and to compel a Civil Service Board to admit relator to examination for an appointment to a position in the classified service.[70]

Moreover, the license itself may be secured by *mandamus* when the officers withholding it are vested with no discretionary power, but entrusted merely with a ministerial duty.[71] This relief was ob-

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[68] This is true even where a license has been applied for and wrongfully refused. City of Montpelier *v.* Mills, 85 N. E. 6 (Ind. 1908). *Vide infra*, p. 289. Third parties may take advantage of the illegality of unlicensed acts in a suit to recover for work done and materials furnished, Bronold *et al. v.* Engler, 105 N. Y. Supp. 508 (1907). Some decisions limit the doctrine to cases where the statute prohibits engaging in the business without a license or expressly vitiates all contracts made by one without a license, and refuse to apply it where such provisions are absent, Streivel *v.* Lally, 101 S. W. 1134 (Ark. 1909); or where the statute merely imposes a penalty, Sunflower Lumber Co. *v.* Turner Supply Co., 48 So. 510 (Ala. 1909). If there was no attempt to comply with the law, third parties may take advantage of illegality where the requirement of a license is a revenue rather than a police measure, Gilley *v.* Harrel, 101 S. W. 424 (Tenn. 1907); but it is held that the non-payment of a revenue tax, where it was tendered but not accepted, does not invalidate the contracts of an unlicensed person, where the occupation was otherwise lawful and required no regulation or supervision. Fossett *v.* Rock Island Lumber & Mfg. Co. *et al.*, 76 Kan. 428 (1907).

[69] Florida *ex rel.* Lamson *v.* Baker, 25 Fla. 598 (1889).

[70] People *ex rel.* Ryan *v.* Wheeler, 2 N. Y. St. Rep. 656 (1886).

Cf. United States *ex rel.* Kerr *v.* Ross, 5 D. C. App. 241 (1895), where commissioners who had unlawfully delegated to a board of examiners the power to entertain applications for licenses were compelled by *mandamus* to receive and entertain the application themselves, and Territory *v.* McPherson, 6 Dak. 27 (1888), where the writ issued to compel commissioners to fix licenses to sell liquor under the right statute after they had fixed them under the wrong one.

[71] People *ex rel.* Danziger *v.* Metz, 107 N. Y. Supp. 970 (1908); State Board of Pharmacy of Kentucky *v.* White, 84 Ky. 626 (1886); People *v.* Busse, 231 Ill. 251 (1907)

tained where the refusal to issue a permit for a building was based on authority claimed under an ordinance declared invalid,[72] and where an excise board denied a license on grounds not committed to their jurisdiction,[73] or for the professed reason that no more saloons were needed and that a number of neighboring property owners less than a majority objected, which was no legal ground for the refusal.[74]

Where, however, the denial of a license is based on a finding of fact lawfully committed to the discretion of the licensing authority, *mandamus* is not available to substitute the discretion of the court for that of the administrative board. In a case where the writ was sought after the board had passed adversely on the standing of the medical school from which relator received his diploma, the opinion stated that

"while courts on suitable occasions will apply the spur of *mandamus* to put the discretion of inferior courts and officers in motion, yet after that discretion has been exercised, as in the case at bar, no matter in what way, the mandatory authority to compel the doing of the particular act prayed for is at an end."

It was further observed that, should the court arrogate to itself such revisory powers,

"it would, while palpably usurping functions conferred exclusively by the law upon others, in the endeavor to ascertain whether a given college is a 'medical institution in good standing,' . . . find itself seriously embarrassed by the character of the investigation it would be compelled to make; might find itself wandering amid the mazes of therapeutics or else boggling at the mysteries of the pharmacopœia." [75]

The doctrine is well established that the courts will not in *mandamus* proceedings endeavor to ascertain for themselves the

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(where the board had no discretion to refuse a license to sell cigarettes manufactured only from pure tobacco).

[72] Bostock *v.* Sams, 95 Md. 400 (1902). Ordinance attempted to authorize refusal of permit to erect building which would not conform in appearance to other buildings in the neighborhood, and would tend to depreciate the value of surrounding property.

[73] Griffin *v.* United States *ex rel.* Le Cuyer, 30 D. C. App. 291 (1908); State *ex rel.* Johnston *v.* Lutz *et al.*, 136 Mo. 633 (1896).

[74] State *ex rel.* Galle *v.* New Orleans, 113 La. 371 (1904).

[75] State *ex rel.* Granville *v.* Gregory, 83 Mo. 123 (1884).

standing or reputation of the institution found deficient by the administration.[76]

The same rule prevails where the licensing authority has in the exercise of discretion duly vested passed adversely upon the personal qualifications or characteristics of an applicant. *Mandamus* was denied to overrule the decision of the State Board of Examiners of Architects in refusing a license to relator on the ground that he was a builder and not an architect, although the trial court had found that he was an architect and had ordered the writ to issue.[77] And where the writ was sought to secure a certificate to practice dentistry denied by the board after a personal examination of the relator, the petition was dismissed and the refusal of the court below to inspect the examination papers was sustained.[78]

Mandamus has been denied to overrule the exercise of discretion in denying a license to a person deemed unfit to be an auctioneer, the court declaring that the discretion of the mayor is not subject to judicial supervision or control.[79] It has been denied also to overrule the determination that relator was not qualified to run an intelligence office,[80] did not possess the moral attainments requisite to entitle him to a license for a dram-shop,[81] or was not a fit and suitable person to conduct a pawnbroker's establishment.[82] So also it was refused where the County Commissioners denied a license to carry fire-arms on the ground that the applicant and his witnesses were unknown to them, so that they were not satisfied as to his moral character.[83] The court observed further that if the statute requiring a license were unconstitutional, *mandamus* certainly could not be employed to compel its issue.

Where the privilege sought is of great importance, the courts are inclined to be more guarded in their language when declining to review administrative judgments on moral qualifications, although a careful search has failed to discover any instance where *manda-*

[76] Williams *v.* Dental Examiners, 93 Tenn. 619 (1894); State *ex rel.* Medical College *v.* Coleman, 64 Oh. St. 377 (1901); State *ex rel.* Kirchgessner *v.* Board of Health, 53 N. J. L. 594 (1891).

[77] Illinois State Board of Architects *v.* The People, 93 Ill. App. 436 (1900).

[78] Ewbank *v.* Turner, 134 N. C. 77 (1903).

[79] People *ex rel.* Schwab *v.* Grant, 126 N. Y. 473 (1891).

[80] People *ex rel.* Hall *v.* San Francisco, 20 Cal. 592 (1862).

[81] State *ex rel.* Kyger *v.* Holt County Court, 39 Mo. 521 (1867).

[82] Harrison *v.* People, 121 Ill. App. 189 (1905).

[83] Florida *ex rel.* Russe *v.* Parker, 57 Fla. 170 (1909).

mus was issued because the court differed from the administration on the question of an applicant's character. But in State *ex rel.* Hathaway *v.* State Board of Health,[84] which denied *mandamus* to compel a certificate to practice medicine, where the board's refusal was based on the ground that relator's previous advertising had been unprofessional and dishonorable, the court qualified its assertion that the Board of Health is charged with the performance of important discretionary duties, whose performance will not be hampered by *mandamus*, by the exception: "until a case of manifest injustice is shown." In a similar case where the unprofessional conduct consisted in the claim to be a medicine man of a tribe of Indians and the proprietor of a marvelous *nostrum* which when taken internally would cure *cholera morbus* and when applied externally drive away rheumatism, the court, though unqualified in its assertion that the certificate could not be compelled by *mandamus*, went further and observed that unprofessional conduct must consist in something more than the violation of some professional code of ethics.[85]

Many of the administrative decisions which the courts decline to review relate to matters which the Supreme Court declares may lawfully be committed to the uncontrolled discretion of the board.[86] Where the discretion is so wide that it may be exercised without announcing the reasons on which it is based, the administrative judgment seems necessarily free from judicial review. To require the administration to set forth in its answer every motive and circumstance which influenced its action would defeat the very

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[84] 103 Mo. 22 (1890).

[85] State *ex rel.* Powell *v.* State Medical Examining Board, 32 Minn. 324 (1884).

[86] This is true of the denial of a license to sell liquor, Sherlock *v.* Stuart, 96 Mich. 193 (1893), where based on the ground of excessive numbers, State *ex rel.* Howe *v.* Northfield, 94 Minn. 81 (1904); denial of a license to keep a tavern on ground place proposed is not convenient, Yeager, *ex parte*, 11 Gratt. (Va.) 655 (1854); to run a theatre, People *ex rel.* Armstrong *v.* Murphy, 72 N. Y. Supp. 473 (1901); to conduct a musical entertainment, on the ground that it would have a demoralizing influence since liquors were dispensed in the place proposed, People *ex rel.* Dorr *v.* Thatcher, 42 Hun (N. Y.) 349 (1886); to erect a livery stable, Hester *v.* Thomson, 35 Wash. 119 (1904); to construct a sidewalk, State *ex rel.* Connor *v.* St. Louis, 158 Mo. 505 (1900); or to run a ferry, on the ground that the public necessity did not require it, State *ex rel.* Campbell *v.* Cramer, 96 Mo. 75 (1888). *Cf.* Commonwealth *v.* State Board of Health, 4 Walker (Pa.) 350 (1862). In Bailey *v.* Van Buren Circuit Judge, 128 Mich. 627 (1901), where the board declined to approve a druggist's bond on the ground that the sureties were insufficient, the court refused to frame for the jury an issue as to good faith.

purpose for which this wide discretion is vested. But Yick Wo *v.* Hopkins [87] is still law to the effect that the exercise of this discretion is improper when employed arbitrarily and unjustly to discriminate against a certain class. One who had been denied a license under such circumstances could clearly resist criminal prosecution.[88]

Possibly under such circumstances, *mandamus* would lie to secure a license. In the opinion from the Missouri court which contained the strongest language against reviewing the administrative discretion by *mandamus*,[89] it was said that the discretionary power to refuse a certificate to practice medicine does not extend to discriminating against any particular school of medicine. And in another case where a peremptory *mandamus* was denied to overrule the decision of the board of health in revoking permits to sell milk, that court suggested that relator should proceed by alternative *mandamus* if the board had acted arbitrarily or tyrannically.[90] In another decision from Missouri, it was declared *obiter* that, if the board withholds a license from caprice, *mandamus* will lie to compel them to perform their duty, even though the ordinance may not provide that no person possessing the necessary qualifications shall be refused a license.[91] The same possibility of judicial review is suggested by another *dictum* which states that to secure *mandamus*, it is not sufficient to allege in general terms that the refusal of the permit was capricious, tyrannical, arbitrary and unreasonable, but that facts tending to show it must be stated.[92]

All these decisions, however, dealt with administrative determinations reached after an endeavor to ascertain whether the applicant possessed certain qualifications or attainments announced as the condition on which all should be entitled to receive the license or permit. Where the board is not required to set forth the conditions which are to control its discretion, its action is necessarily in a certain sense capricious and arbitrary. Since no applicant has ground of complaint merely because he is denied permission under circumstances identical to those under which it is granted to another, it must be exceedingly doubtful whether he could coerce the issue of a license by showing further that licenses were invariably denied to

[87] 118 U. S. 356 (1886). [88] *Ibid.*

[89] State *ex rel.* Granville *v.* Gregory, 83 Mo. 123 (1884).

[90] People *ex rel.* Lodes *v.* Board of Health, 189 N. Y. 187 (1907).

[91] St. Louis *v.* Lamp Mfg. Co., 139 Mo. 560 (1897).

[92] People *ex rel.* Shelter *v.* Owen, 116 N. Y. Supp. 502 (1909).

some group or class to which he belongs under circumstances which uniformly resulted in permission being accorded to others. It is more likely that he must assume the risk of acting without permission, relying on the discrimination practiced as a defense when prosecuted criminally.

But the *dicta* quoted are an indication that where the discretion vested is not unlimited, *mandamus* will sometimes lie to control the action of the board. Where their discretion is confined to the ascertainment of matters of fact, *mandamus* may be employed to review the assumption of power to determine questions of law.[93] Thus the writ was granted where the return of building commissioners admitted conditions necessary to entitle relator to his certificate and revealed that their refusal was based on error of law.[94]

And where in any other way the pleadings disclose that the issue of the writ will not interfere with the exercise of discretion but will force action refused on some other pretense, the court will grant relief. Thus where on demurrer to the petition it was conceded by the board that the relator on examination had exceeded by five per cent the minimum requirements and that he was denied his certificate "wilfully and maliciously," redress was given on the theory that the board having exercised its discretion and found relator qualified, the issue of the certificate was a mere ministerial act.[95] The writ was also granted where the discretion vested was confined to the power to determine the reputability of the college from which relator received his diploma, and the board by demurrer confessed that it found the standing of the institution satisfactory, but denied the license through malice and the desire to injure relator's college in order to promote the interests of a rival in which the members of the board were personally interested.[96] Having determined that the college was reputable, their judicial or discretionary power was said to be exhausted. In discussing the function of the writ, the court declared that it could afford a remedy where the discretionary power was exercised with "manifest injustice" or where "it is clearly shown that the discretion is abused." It was said that an officer may be guilty of "so gross an abuse of discretion or such an

[93] Gage *v.* Censors, 63 N. H. 92 (1884).

[94] MacFarland *v.* Miller, 18 D. C. App. 554 (1901).

[95] Dean *v.* Campbell, 59 S. W. 294 (Tex. 1900).

[96] The Illinois State Board of Dental Examiners *v.* The People *ex rel.* John M. Cooper, 123 Ill. 227 (1887).

evasion of positive duty, as to amount to a virtual refusal to perform the duty enjoined." No such broad principle was necessary to establish the right to relief under the pleadings; but in a recent Missouri decision, the issue of the certificate was compelled merely because the court differed from the board on a finding of fact.[97] The denial of the certificate was based on the finding of the board that the applicant was not a matriculant in a medical school prior to a certain date. The court ruled that the evidence before the board could not possibly warrant such conclusion, and seemed to regard its power to overrule the finding of the board in the same light as its duty to set aside the verdict of a jury. But any such doctrine must be confined to determinations based merely on the weighing of evidence and involving no exercise of expert judgment or opinion.

Where the discretion has been rightly exercised, the court will not issue *mandamus* conditioned on compliance by the relator with such lawful changes as the board may order. "The office of a *mandamus* is not to compel action by the building department in advance of the preparation and adoption of proper plans, but only to compel action when plans affording no legitimate ground of objection have been arbitrarily or unreasonably condemned." [98]

The writ will not issue against an officer subject to the control of some higher administrative authority. Thus, where a building commissioner denied a permit to make alterations and his denial was sustained by a Board of Appeal, the court held that he had no authority under the statute to issue the permit and therefore could not be constrained by *mandamus*.[99] Whether some action might be entertained to review the decision of the Board of Appeal was not determined.

Certiorari proves an even less effective remedy than *mandamus;* for it is refused, not only because of the nature of the decision sought to be reviewed,[100] but because of the impotence of the

[97] State *ex rel.* McCleary *v.* Adcock, 206 Mo. 550 (1907).

[98] Hartmen *v.* Collins, 94 N. Y. Supp. 63 (1905).

[99] Greene *v.* Damrell, 175 Mass. 394 (1900).

[100] In Hildreth *v.* Crawford *et als.*, 65 Iowa 339 (1884), where a pharmacist's license was revoked because of illegal sales of intoxicants, the court declared that where the commissioners of pharmacy are clothed with power to determine certain facts, their decision cannot be reviewed on *certiorari* upon the ground that the evidence was incompetent or insufficient; and in State *ex rel.* Puyallup *v.* Superior Court, 50 Wash. 650 (1908), prohibition was issued to prevent *certiorari* to review the act of the council in revoking a liquor license. on the ground that its action in revoking a license with-

remedy. "If the act of granting a license is merely ministerial, the writ of *certiorari* will not lie to review an order of the board, because it is not judicial in its nature. And if the act is judicial, yet discretionary in character, the writ will not lie because it would be contrary to a discretionary power to have it reviewed by way of appeal, or by any proceeding in the nature of an appeal." [101] The writ has been denied to review the determination of a board of health that relator was not entitled to a license to sell milk, where under the statute such determination might be reached without granting a hearing, on the ground set forth in the opinion that *certiorari* lies only to review action judicial in character, and a judicial proceeding implies a hearing as a matter of right to the person affected thereby.[102]

In some jurisdictions, however, *certiorari* is employed to review administrative action not necessarily judicial in nature. There it seems to afford the same opportunities for redress which are available in *mandamus* proceedings. In Pennsylvania, though *certiorari* is denied to review the exercise of discretion in granting or refusing a license to sell liquor,[103] it is employed, where there has been a hearing, to ascertain whether the licensing authority has kept within the limits of the powers conferred and has exercised them in conformity with law. It was decreed that where there was no discretion to refuse a license, the denial of the board should be reversed and a *procedendo* awarded.[104] In New Jersey, relief against the revocation of a license was granted for the express reason that the board had failed to accord a hearing.[105] In an Iowa decision which denied *certiorari* on the ground that it is unavailable to review the correctness of decisions of fact within the jurisdiction vested, it was

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out cause and refunding the unearned portion of the license fee is conclusive and not subject to review by the courts.

[101] Com'rs of Raleigh *v.* Kane, 2 Jones L. R. (47 N. C.) 288 (1855).

[102] People *ex rel.* Lodes *v.* Department of Health of the City of New York, 100 N. Y. Supp. 788 (1906), affirmed on appeal without opinion in 102 N. Y. Supp. 1145 (1907).

But in the same jurisdiction it may possibly be inferred that *certiorari* is not necessarily improper to review the revocation of a license after a hearing, for the denial of the writ has been placed on the ground that it was not requested in season to award relief before the expiration of the license. People *ex rel.* Pechtold *v.* Bogart, 107 N. Y. Supp. 831 (1907).

[103] Reed's Appeal, 114 Pa. St. 452 (1886).

[104] Pollard's Petition, 127 Pa. St. 507 (1889).

[105] Balling *v.* Board of Excise of City of Elizabeth *et al.*, 74 Atl. 277 (N. J. 1909).

stated *obiter* that *certiorari* may consider whether the defendant has exceeded his proper jurisdiction or is otherwise acting illegally, and that relief would be given if the determination had been reached without a hearing.[106] But this employment of the writ to review action not judicial in nature runs counter to the great weight of authority.

Where there exists a recognized ground of equitable jurisdiction, it seems that the licensing authority may be enjoined from taking any action with respect to the granting or refusal of a license, if the statute under which it claims authority is unconstitutional.[107] But an injunction will not issue merely because the board seems about to make a mistake in deciding whether a license shall be granted. Where it was sought to prevent a sealer of weights and measures from deciding whether he would approve of a certain kind of computing-scale, on the ground that he intended to condemn all scales of the given variety, it was held that the correctness of this kind of scale was not properly in issue, because the court could not take from the officer the duty of deciding the question on the ground that he intends to come to a wrong decision.[108] In another case injunction was denied to restrain the revocation of a license, on the ground that the board had the right to proceed to revoke even if they were about to act erroneously, and that the statute giving an appeal to the district court on questions of law and fact furnished an adequate remedy.[109] Such remedy as is afforded by the possibility of securing the license by *mandamus* would seem sufficient ground for denying the interposition of equity in all cases where no positive interference is threatened.

Moreover, it has been held that injunction will not lie to restrain a board of health from interfering with a business for which a permit was denied, however wrongfully, where the statute provides pecuniary penalties for the violation of their orders, for this is in the nature of an appeal to equity to restrain public officers from enforcing the criminal law.[110] But a contrary result was reached where the court held that the rule that equity will not enjoin the enforcement of a penal ordinance is limited to attempts to restrain judicial

[106] Iowa Eclectic Medical College Ass'n *v.* Schrader, 67 Ia. 659 (1893).
[107] Moneyweight Scale Co. *v.* McBride, 199 Mass. 503 (1908), (*semble*).
[108] *Ibid.*
[109] Wolf *v.* State Board of Medical Examiners, 123 N. W. 1074 (Minn. 1909).
[110] Cohen *v.* Department of Health, 113 N. Y. Supp. 88 (1908).

enforcement, and restrained a board from closing the plaintiff's place of business for the alleged violation of a liquor ordinance.[111] Where the enforcement threatened is not penal in its nature, a bill will be granted to restrain unlawful action, provided there is some basis of equitable jurisdiction. The immediate incarceration in a pest house of one afflicted with leprosy has been restrained where it appeared that less stringent measures would afford adequate protection to the public.[112] The court doubted whether an action for damages would be an adequate remedy, even if one would lie, but were of opinion that the officers would not be personally responsible for such an error in honest judgment of what their official duty required. In a case where a bill to enjoin the enforcement of an ordinance requiring the registration of plumbers was dismissed because the ordinance was held to be valid, the court observed that even if it were void, no individual plumber could secure an injunction because no property right was involved, but that the firm employing plumbers might secure such relief because there was a threatened invasion to property rights in that their business would be greatly injured if they were prevented from securing the services of plumbers.[113] It is not inconceivable that the individual plumber might also feel that his business would be greatly injured if he were prevented from securing employment.

It is manifest, then, that where the lawfulness of any action may be conditioned on the possession of a license, the individual is largely dependent upon the judgment of the administrative body to whom the duty of passing upon his qualifications is entrusted. Without a license he proceeds at his peril. Where there is power to regulate and the standards imposed relate to the matter under supervision, but are invalid merely because of their excess, the one denied permission cannot proceed without a permit, but is limited to the right to enforce the issue of a license or permit on compliance with standards deemed adequate by the court. A builder cannot erect a wall according to his fancy, although the requirements of the administration may be excessive.[114] It has been held that a showing of

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[111] Cañon City *et al. v.* Manning *et al.*, 95 Pac. 537 (Col. 1908).

[112] Kirk *v.* Wyman, 83 S. C. 372 (1909). In Chicago *v.* The Ferris Wheel Co., 60 Ill. App. 384 (1895), the city was enjoined from interfering with the Ferris Wheel for nonpayment of a license fee which the court adjudged exorbitant.

[113] Robinson *v.* City of Galveston, 111 S. W. 1076 (Tex. 1908).

[114] City of New York *v.* O. J. Gude Co., 107 N. Y. Supp. 484 (1907), (*semble*).

qualifications, a tendered compliance with all the terms and conditions of the license ordinance, and an arbitrary and wrongful refusal by the municipal authorities to issue the license does not waive the necessity of such license or justify acts done without it.[115] But the minority opinion insisted that such a doctrine applies only when the board has discretion to refuse the license. In an earlier decision in the same jurisdiction, where the license was withheld by a ministerial officer after the licensing authority had ordered its issue, it was held that no conviction could be sustained for acting without the license. The wrong was said to be that of the officer, not of the applicant.[116]

And it is clear that a prosecution for unlicensed acts may be defeated by showing that the statute under which the license is required is not a valid police measure, because a mere pretense for exacting revenue, because the matter to which it relates is not subject to police supervision,[117] because the qualifications or conditions required are not germane to the matter under regulation,[118] because the statute discriminates unwarrantably against certain members of the class required to be licensed,[119] or permits such discrimination to be made by the licensing authority,[120] or because the uncontrolled discretion lawfully vested is employed unreasonably to discriminate against the class to which the defendant belongs.[121]

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BURLINGTON, VT.

[*To be continued.*]

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[115] City of Montpelier *v.* Mills, 85 N. E. 6 (Ind. 1908), and cases cited in the opinion. *Cf.* Phœnix Carpet Co. *v.* The State, 22 So. 627 (Ala. 1897), which held that wrongful refusal to receive payment of a tax and to issue a license does not justify corporation in doing business without the license. Its remedy is by *mandamus* to compel the issue of the license.

[116] Padgett *v.* The State, 93 Ind. 396 (1884).

[117] Bessette *v.* The People, 193 Ill. 334 (1901).

[118] Cummings *v.* Missouri, 4 Wall. (U. S.) 277 (1866).

[119] State *v.* Gardner, 58 Oh. St. 599 (1888); Harmon *v.* The State, 66 Oh. St. 249 (1902); State *v.* Gantz, 124 La. 535 (1909); Commonwealth *v.* Shafer, 32 Pa. Super. Ct. 497 (1907).

[120] Yick Wo *v.* Hopkins, 118 U. S. 356 (1886).

[121] *Ibid.*, as qualified in Crowley *v.* Christensen, 137 U. S. 86 (1890).

THE SEVENTEENTH CENTURY INDICTMENT IN THE LIGHT OF MODERN CONDITIONS.

NO reform of the criminal procedure will be complete without radical changes in the law relating to indictments. Changes should not be made which would prejudice the *essential* rights of the accused. But if these are preserved the reform can go to any extent that may be thought advisable.

In order to determine what changes can be made without such prejudice, it is important to know what the object of an indictment is as the present law declares it.

The Supreme Court of the United States has made the following declaration relating to the matter:[1]

"The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.

"The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defence by motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment."

The objects of the indictment, then, are these: (1) to enable the accused to prepare his defense, (2) to enable him in case he is again prosecuted for the same crime to plead as a defense his former conviction or acquittal, and (3) to give the court an opportunity to decide the case on the indictment without hearing the evidence, and the accused an opportunity to elect as to how he shall present his defense.

How many of these can be dispensed with without injuring the essential rights of the defendant?

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[1] United States *v.* Cruikshank, 92 U. S. 452, 558, 559.

These statements quoted from the opinion of the Supreme Court indicate that an indictment is required for the benefit of the court. The theory of the common law, both on the civil and on the criminal side, was to try the case on the papers and not on the proof; to eliminate, so far as possible, questions of fact and the evidence to support them, leaving only questions of law to be decided by the judge.

To a great extent this theory has long been abandoned in civil cases, and there is no reason why it should not be in criminal cases. Of what importance is it to the court to know whether or not the facts *alleged* constitute an offense, when after the evidence has been presented it will have an opportunity to determine whether or not the facts proven constitute an offense?

So far as the present rules are for the benefit of the court as distinguished from the accused, they can be changed without injury to the substantial rights of the latter. But even as to him, these rules, so far as they relate not to the substance of his defense but to the particular manner in which he shall present it, are of no great moment.

What real difference can it make to him whether he present a defense which he has, by a plea of not guilty, or by a demurrer? If he is allowed to present the particular matter which he wishes to allege by a plea of not guilty, he is deprived of no substantial right by a law which abolishes motions to quash. If the right to demur is taken away it cannot be said that any constitutional privilege has been infringed. Nor can it be said that any right of the defendant is violated if the court is prohibited from deciding the case on the pleadings, and is required to decide it upon the facts.

It may be said that if a demurrer, or plea, or motion is sustained, the defendant is relieved of the expense of going to a trial on the merits, and a great deal of money may be thereby saved to him. This is true. But neither the Constitution nor any law declares that an innocent man shall be put to no expense in freeing himself from a groundless charge. One of a defendant's essential rights is that he shall not be convicted without a trial. But that such trial shall be carried on without expense to him is nowhere guaranteed.

There needs no argument to show that demurrers and motions to quash delay the progress of the case. That they can be abolished without impairing the essential rights of the defendant, clearly

appears. Whether they should or not is a question of expediency which will be discussed later.

Another object of the indictment is to enable the accused in case he is again prosecuted for the same crime, to plead as a defense his former conviction or acquittal.

This theory firmly imbedded in the common law has led to more absurd decisions than almost any other. It is chiefly responsible for the rule that the indictment must state all the ingredients of the offense. It is also responsible for those decisions which hold that if one is indicted for stealing a white horse belonging to Adams, and the jury find that the horse which he stole from Adams was a black one he must be released. The reason given is this: if he afterwards were indicted for stealing the black horse and pleaded that he had once been convicted therefor, he could not prove his plea, because on referring to the first indictment it would be seen that he was there charged with stealing a white horse. There never was any reason founded on experience for the existence of this rule. For if the man was convicted of stealing Adams' horse and served his sentence, no one would ever think or ever did think of prosecuting him again for stealing the same horse, no matter whether it was called a white horse or a black one in the first indictment. It is also safe to say that in cases where a defendant was acquitted on the ground that he never stole any horse belonging to Adams, whether white or black, not once in a thousand times would any one ever think of attempting to try him over again for the same offense, because the animal was wrongly described in the first indictment. And to cover even the thousandth case it would be very easy to provide that on the second trial the defendant should be permitted to introduce the evidence upon which he was acquitted, for the purpose of showing that the color of the horse had nothing to do with the result.

It therefore seems that this object of the indictment can be eliminated without prejudice to the essential rights of the defendant, and that all such rights can be preserved by providing simply that in case of a second indictment the entire proceedings of the first trial may be examined for the purpose of knowing just what was decided. With this elimination there would go one of the reasons for saying that the indictment must contain all the ingredients of the offense.

Of the three objects of the indictment there remains for consideration the first — to enable the accused to prepare his defense. It is confidently submitted that in any country where the object of its laws is the punishment of the guilty only, this should be the sole and exclusive object of an indictment, complaint, or criminal charge.

It is, however, thoroughly settled, at least in the federal courts, that the indictment must contain all the ingredients of the offense, that it must state all the facts which are necessary to constitute the crime.

The holdings of the Supreme Court to this effect did not result from that provision of the Sixth Amendment to the Constitution which requires that the defendant be informed of the nature and cause of the accusation against him, but rather from the doctrines of the common law and the rule adopted in England long before our Constitution was framed.

So true is this that the Supreme Court has said, in a case going up from the Philippines,[2] where the only provision was that the defendant should be informed of the nature and cause of the accusation, that it was not necessary, in order to satisfy that requirement, that the complaint should be good as against a demurrer. In that case the court observed:

"The bill of rights for the Philippines giving the accused the right to demand the nature and cause of the accusation against him does not fasten forever upon those islands the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert."

It of course shocks the American or English lawyer to suggest that a man can be brought to trial upon an indictment or complaint which states the commission of no offense. But why should he not be? There are countries whose laws do not make the requirements which ours do. Judicial systems that have been adopted by highly civilized nations cannot be said to be wholly wrong, even if they do consider the rights of their subjects fully protected although the notice given to them of a criminal charge does not specify minutely and in great detail every possible ingredient of the offense.

It seems to be the fashion now for Americans to criticize harshly

[2] Paraiso v. United States, 207 U. S. 368, 372.

the Continental systems of criminal procedure. It might be suggested that this criticism comes with bad grace from a people whose administration of the criminal law is believed by some of their most prominent citizens to be a failure. Digressing a little, it may be said that much of it is based on misinformation as to what such systems really are. The American newspapers are wont to say that in the courts of Continental Europe a defendant is presumed guilty, and the doctrine that no conviction can be had unless guilt is proved beyond a reasonable doubt, was never heard of in any Latin country. To persons holding this belief a perusal of law 12, title 14, of the 3d *Partida* is commended. That law was promulgated in Spain more than six hundred years ago. It is as follows:

"A criminal suit which may be brought against any person either by way of accusation or of challenge, must be plainly proven by witnesses, by documents, or by the confession of the accused, and not by inference only. For it is a right thing that a suit which is instituted against the person of a man or against his reputation, should be investigated and proved by evidence clear as the light, in which there can be no manner of doubt. And therefore the wise men of old decided in this manner, and said that it was a more holy thing to acquit the guilty man against whom the judge was not able to decide by proof certain and manifest, than to give judgment against an innocent man, although they might find some suspicious circumstances against him."

Moreover, the system which requires a judicial officer (who neither prosecutes nor afterwards tries), as soon as he is notified of the commission of an offense to repair to the place and *at once* examine under oath all persons who appear to have knowledge of the affair, reducing their statements to writing, seems in theory to be superior to our plan of having such investigations conducted by administrative officers, or by professional or amateur detectives.

The Anglo-Saxon idea of an indictment came from the technical rules of pleading in civil actions adopted centuries ago. It lost sight entirely of that part of the procedure which related to the proof, and sacrificed everything for a scientific system of allegations.

All of the ingredients of the offense must be proved on the trial, but it is asserted with confidence that no reason can be given why they should all be set out in the notice to the defendant.

In what is said here it is not suggested that the grand jury be abolished. It can be retained. The written instrument which that

body returns into court should, however, not be required to set out all the ingredients of the offense, but need only inform the accused of the nature and cause of the accusation with sufficient definiteness so that he may prepare his defense.

That a defendant may be able to prepare his defense and still the indictment not be sufficient under the present rule, is shown in a variety of cases.

A jury found as a fact that Carli knew when he passed a counterfeit bill that it was counterfeit, yet after that finding he was released by the Supreme Court because the indictment did not allege that he knew that fact.[3] A complaint for adultery which did not allege that the defendant knew that the woman was married was defective under the Philippine law.[4] McDonald a railway engineer was released from a charge of manslaughter through criminal carelessness, because the indictment did not allege that he knew that a passenger train was due.[5] So when one is indicted for receiving stolen goods it must be alleged that he knew that they were stolen. It is apparent that if Carli in fact knew that the bill was counterfeit, if Mortiga knew that the woman was married, if McDonald knew that another train was then due, to be told of this fact by the grand jury in the indictment would in no way help any one of them in his preparation for trial. And if he did not know it he could not be convicted, no matter what the indictment alleged.

Laws requiring the complaint or indictment to state facts constituting an offense, and then allowing a demurrer to be presented based on the ground that no offense is alleged, should be repealed. And it should be declared that any complaint or indictment should be considered sufficient if it informed the defendant of the nature and cause of the accusation with sufficient definiteness so that he could prepare for trial.

The question recurs whether a demurrer or motion to quash should be allowed on the ground that the indictment does not comply with the new requirement. It is of course true that in case the complaint does not sufficiently notify the defendant of the nature and cause of the accusation, a great deal of expense will be saved

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[3] United States v. Carli, 105 U. S. 611.
[4] Serra v. Mortiga, 204 U. S. 470.
[5] State v. McDonald, 105 Minn. 251.

both to the government and to the accused, and a great deal of trouble to witnesses and jury if that fact can be determined in advance of the trial. It is also true that in case the complaint is sufficient a great deal of time is wasted by the presentation of such dilatory pleadings or motions.

An examination of the decided cases would probably show that a great many more demurrers were overruled than were sustained. It is therefore believed that the administration of the criminal law would be improved if demurrers were entirely abolished.

But if this were found not practicable, and if the demurrer had to be retained, it should be interposed, not on the ground that the indictment did not state facts constituting an offense, but on the much more limited ground that it did not so notify the accused of the charge against him that he could prepare his defense. It should moreover point out the particular matters upon which the defendant wished to be further informed. If the court should be of the opinion that the defendant could not prepare for trial on the information furnished by the indictment, the law should allow an amendment to be at once made by the prosecuting officer without any action on the part of the grand jury. The law at present requires the grand jury to be satisfied from the evidence that all of the essential ingredients of the crime can probably be proved, and it also requires it to see that they are all contained in the indictment. The necessary result was that if an essential element of the crime was omitted from the indictment, the presumption arose that the grand jury had not found that particular fact proved. From this sprang the rule that an indictment could not be amended except by the grand jury itself.

But under the reformed procedure, while the grand jury will still be required to find all the facts proved which are necessary to constitute the offense, it will no longer be required to set them all out in the indictment. The objection to amendments by the prosecuting officer will thereupon disappear.

Can these changes be brought about without constitutional amendment?

The Act of Congress relating to the Philippines provides that no person shall be held to answer for a criminal offense without due process of law; that in all criminal proceedings the accused shall enjoy the right to demand the nature and cause of the accusation

against him, and that no law shall be enacted which shall deprive any person of life, liberty, or property, without due process of law.

It can be fairly deduced from the decision of the Supreme Court referred to,[6] that these provisions do not require that the complaint or indictment shall set forth all the facts which constitute the crime. In those jurisdictions, therefore, as in Minnesota, where similar provisions are in force, the desired changes can be made by an act of the legislature, and no amendment of the Constitution will be required.

The Fifth Amendment to the federal Constitution provides, however, that no one shall be held to answer for a felony except on an indictment by a grand jury. The word "indictment" must be construed to have the meaning given to it at the time the amendment was adopted.[7] It there meant an instrument which set forth all of the ingredients of the offense. It seems therefore that no change of the kind here sought could be introduced in the federal courts in cases of capital or otherwise infamous crimes, except by an amendment to the Constitution. In cases of misdemeanors, however, it can be done by an act of Congress alone.

Charles A. Willard.

MINNEAPOLIS, MINN.

[6] Paraiso *v.* United States, 207 U. S. 368.
[7] Kepner *v.* United States, 195 U. S. 100, 125.

THE DECADENCE OF THE SYSTEM OF PRECEDENT.

SOMEWHAT over a year ago, this REVIEW printed a plea of mine for "straight thinking concerning the enforcement of the laws as they exist." [1] The contention there advanced was based upon the hypothesis that the existent *status* of laws was a determinable fact. So far as concerns statutes, the hypothesis is indisputable, although it requires the utmost vigilance on the part of lawyers actively engaged in practice to keep in touch with the changes of the statutory law constantly made by our numerous legislative bodies. But when we consider the field of the unwritten law, the vast mass of matters not covered by statutes, can we regard our hypothesis as established? In a word, have we a system of precedents which enables us to determine from an examination of them what the law on any particular subject (not regulated by statute) ought to be declared by the courts to be, when a dispute of litigants brings the matter there for determination?

The answer to this question is of the greatest importance, both to the lawyer who seeks to advise a client with a reasonable degree of assurance, and to the courts who have to make the final declaration on the dispute. It is manifest that some definite answer ought to be made to the question, in order that we shall come to a clear understanding of the system (or want of it) under which we are working. Nothing can be more deleterious to our legal administration than to purport to be acting on a basis which has no foundation in fact. In law, as in everything else, the most vicious mental process is that which involves dishonesty with ourselves. If our ancient system of precedent has become impracticable, the sooner we frankly admit it and seek another basis, the better it will be. Chaos even is preferable to intellectual dishonesty.

When our system of precedent had its birth, in England, there was no difficulty by way of too great a mass of authorities. Indeed, the opposite difficulty barred the path of progress; there were *no*

[1] 22 HARV. L. REV. 427.

precedents, or, what few there were, could not be found in sufficiently definite form to justify scientifically accurate action on them. The judges' and lawyers' recollections of the cases which came before them for determination or in which they participated, had to be the basis of future action and decision. Naturally, this was a loose method. Recollections differed, or the precise determinant fact was forgotten or perverted. But, still, the system worked. There were few courts and a small bar of men who devoted practically all their time to the trial of causes and the argument of appeals involving a continuous refreshing of their memories on the details and principles of the past authorities. Moreover, the bar was a carefully selected body of men of superior intelligence, with high ideals and a keen sense of their obligation to administer rationally and fairly the system under which they were working.

Then came the more careful and systematic reports of the decisions. It was no longer necessary to depend upon frail human memory and tradition as to what a given authority stood for. Some young lawyer, ambitious to have a set of precedents of his own and not yet in the enjoyment of a practice which consumed his time and energies, sat in court during trials and appeals, and made detailed notes of what took place. These note-books, in an entirely natural course of evolution, were among our first books of reports. A realization of the tremendous assistance of these sporadic reports in the administration of the system based on precedent, inevitably gave birth to the plan of having all the doings of courts of sufficient dignity and standing put down in fairly comprehensive form for future reference. Even this stage of development presented few difficulties in practical operation in England — at least, until comparatively recently. There was but the one general jurisdiction; the courts were not numerous; their utterances not voluminous; opinions were not delivered, or, at all events, not recorded, in matters involving no new or important questions; judges came to the bench, generally speaking, from the best of the bar, and were familiar with the *status* of the authorities.

In time, however, these reports began to get too voluminous to be carried about in the heads of even the scholarly lawyers and judges or to be disclosed in the limited research a busy lawyer or judge was able to make. It was found that some former decision had been overlooked in passing on the subsequent similar state of

facts. Or, perhaps, the forceful personality of some judge had made itself manifest in deliberate revolution against the rule established by the earlier cases. The question then was presented, whether the courts ought to adhere to the later decision, or whether the rule first laid down should be reasserted. Truly, Pandora's box was opened when this state of the authorities was reached! The fertile field of opportunity for well-nigh endless litigation became open to him who would till it. And even to those who had no litigious desires, it became necessary to engage in long and expensive contests in order to secure a final determination on some matters which had to be determined *somehow*. Eventually, the rule to govern the particular subject would be definitively laid down, of course. But the diversification of conditions and the ingenuity of man constantly presented new questions and new phases of old questions, until it has been found quite beyond the power of even the most studious and scholarly *savant* to bear in mind the various decisions on even one branch of the law.

"Confusion worse confounded" has resulted from the complexity of our modern civilization and the facility of inter-communication. It is no longer a question of carrying in an over-burdened memory, or of making a search for, the precedents of *one* jurisdiction, but of almost innumerable courts, for centuries even, in some cases. A lawyer cannot safely remain ignorant of the development of the law in other jurisdictions, for, notwithstanding prior decisions, the novel tendency in the foreign state may produce a change of views in his own state. How manifestly absurd it is for the practicing lawyer even to attempt to keep *en rapport* with the decisions of Great Britain, of the numerous federal courts, and of the other states, while he is laboriously endeavoring to read the opinions of the higher courts of his own state in the few leisure moments he can get from the other demands of his professional life!

Let us narrow the consideration to one jurisdiction and see if we do not find an impossible condition even there. Take New York, for example. In 1895, there was created an Appellate Division of the Supreme Court, which, as to some matters, is an intermediate court of appeals, and, in certain respects, is a court of last resort. This court began its work on January 1, 1896. In these fifteen years which have elapsed since its creation, one hundred and thirty-eight volumes of reports, containing from seven hundred to upwards

of nine hundred pages, have been issued. During this time, the Court of Appeals — the general court of last resort — has issued some fifty volumes of from five hundred to seven hundred pages each. The decisions of the Supreme Court of the United States, and of the Federal Circuit Court of Appeals and Circuit Court for the particular circuit covering his state, have to be followed by every lawyer, under our dual system of government. The Supreme Court has published some fifty-five volumes of, say, seven hundred pages each, during the period we are considering. The *quantum* of decisions of the United States Circuit Court in New York during this period is not readily ascertainable, but it is, without doubt, commensurate with the deliverances of the other courts more specifically considered.

Is it not entirely clear that, with such a mass of current decisions, no one — not even the judges themselves, who have not the details of a practice to interfere with the pursuit — can follow, even superficially, the development of the law in his own state? It seems manifestly so.

There is, moreover, another reason for the decay of our former system of precedent, apart from this breaking down of its own weight. I refer to the tendency of mankind to rebel at the application of an established principle to a particular case where it seems to work a hardship. The tendency is manifest not only amongst laymen: it has found lodgment in the mental operations of courts and lawyers. Sometimes judges consciously stretch the rule of law until it loses shape in order to effect what they think the desirable result in the particular cause. A story which is told of a Judge of one of the stronger eastern courts of last resort, aptly illustrates the effect of this tendency. This Judge was not long since asked his opinion concerning a brief submitted to his court in a cause in which he had not sat. Counsel for appellant said to him: "My brief was forty pages; only ten pages dealt with matters which, under the decisions of your court, were actually open for decision by the court; the other thirty pages were devoted to demonstrating the injustice of the result reached by the courts below. I would like to know, if you feel free to tell me, whether I ought to have submitted the forty-page brief, or whether I should have confined myself to the ten pages of discussion on the questions really open." "Well," said the Judge, "perhaps I can answer that best by telling

you that the first question we take up in the consultation-room is, 'which side ought to win?'"

Any such mental operation or habit of thought is, naturally, inimical to the proper working of a system of precedent. I do not mean to imply that any consideration of "which side ought to win" necessarily interferes with a decision based on prior rules; but initial deliberation on such a question almost inevitably tends toward the destruction of a system of precedent. And, as a matter of fact, matters have gone much further than indicated in the story just quoted. The first inquiry of many courts may be, "which side ought to win"; but the last one is too often: "How can we let that side win, in the face of the authorities and our own decisions?" When that point is reached, what is left of our much-vaunted system of deciding cases in accordance with the rules laid down in prior opinions? Surely it remains as a mere mirage luring us on to our undoing! It allows us to purport to act on a system which has no real existence. It leads inevitably to intellectual dishonesty.

I believe no one can doubt this tendency of courts who has followed the operations of any particular court for any considerable length of time. If one has doubts, let him compare the opinions and decisions of the last ten years with those of the preceding decade. He will find, I am sure, a decreasing discussion of precedents and a constantly increasing reference to the merits or demerits of the particular cause under decision. He will also find affirmances, and even reversals, without opinion, where the decision is not consonant with prior decisions, though apparently equitable and just in the given case. Courts are unquestionably affected by the atmosphere about them, and this is the prevalent mode of thought to-day: "Which side ought to win?" It is little to be wondered at if, with such an atmosphere, and with the tremendous mass of undigested and indigestible authorities confronting them, our courts pay less and less heed to precedents.

Then the lawyers are infected. How can a man help observing and following the tendency of the courts before which he practices? It is inevitable that he must lay less and less stress on what the court has heretofore declared the law to be, and more and more on what he regards as the "equities" of his case, if the courts adopt such a course in rendering their decisions. And we find him doing it, even the more eagerly as it saves him a vast amount of work in

searching out and discussing the large number of authorities. It is always easier to discuss the merits of the case, as they appear in the facts presented, than it is to digest and present to the court the pertinent prior decisions in a scholarly manner.

There does not seem to be any room for doubt that we have well-nigh reached the parting of the ways: either we must frankly discard the purported system of precedent and devise something different, or we must set our faces resolutely toward its restoration to a strong and controlling force. Can we afford to discard it? If we do, there seems but one course open to us — codification. The boast of all the administrators of our common-law system of precedent has always been that it avoided the ossification inevitably incident to the code plan; that it allowed for the give-and-take of changing civilizations and conditions, without the hardships necessitated in particular causes when a statute had to be changed to meet an altered condition; that its underlying principles were big and broad enough to stand any strain or to meet any exigency. Surely the ideal is worth working and fighting for! It is even more so, when viewed in the light of our attempts at codification. Most of the work of that sort has been badly done in this country. Our haste to be done with the particular task generally precludes us from the patient examination of all the prior cases and laws and the exhaustive consideration of all the natural and possible results of the proposed legislation, which any good codification imperatively requires. We see one large need to be filled or one crying evil to be corrected, and the vividness of the vision deprives us of all other hind- or foresight. Moreover, the men best qualified to do such work are rarely obtainable. Our judges are too busy deciding causes, our lawyers too much occupied in furnishing the materials for such decisions, and our teachers of law too much engaged in making embryonic lawyers and judges. The work is thus left largely to those least fitted for the work, namely, those who have some particular "axe to grind," or the legislators, who have not the requisite ability or scholarship.

We find, too, not only this difficulty of codification, in practical operation, but it is also to be borne in mind that we are a people whose temperament and habits of thought are radically opposed to the hard-and-fast rule. What I have just noted as one of the difficulties of the rigid administration of our system of precedent,

applies with greater force to any code system. Consider for a moment the rapidity with which we change a statute as soon as we get it on our statute book; if it lasts over two sessions of the legislature without material modification, it is exceptional. Consider, too, our disregard as by common consent of numerous statutes we enact into law, such as excise and police legislation. The rule is still laid down in the penal or criminal code, but we have changed our minds or we do not like the rule when we try it, so we calmly disregard it. And in all this there is much reason in a country like ours where conditions may change over-night. We are predisposed to the system with the most elasticity in it because it fits our environment. Our greatest censure of the system of precedent even is that it is not elastic enough.

It is the best system, however, that man has yet devised — at least for us and our conditions. We *must* have some rule of conduct, and any rule involves a certain degree of rigidity. Let us earnestly set to reëstablishing it, rather than consciously or unconsciously whittling it down.

There is no doubt that an intelligent and united effort now can overcome even the difficulties we have been discussing. We can escape the crushing accumulation of authorities and opinions by referring to the broad principle which any especial line of cases lays down rather than to the particular cases themselves with their endless variation. Let us cease to be "case lawyers," in the sense of seeking a precedent with like facts. It is the rarest chance to find a case which is on all fours with the one up for decision. It is an everyday experience to find numerous authorities which enunciate clearly the principles that ought to determine the case at bar. When we have found that principle, the cases are not important. Our system of precedent ought to be one of principles — not cases. Many of these principles are so clearly established that authorities in support of them are superfluous. If we find one or more of our "hard cases" which have departed from the principle, let us avow the error which such cases involve, and frankly cast them overboard, instead of seeking to distinguish them by ingenious sophistries. When the principle is clearly established and the cause to be decided manifestly governed by it, let us refrain from augmenting the mass of legal literature by further learned opinions. The pride of particular judges and the feelings of individual lawyers may suffer in this

process, but nothing is accomplished without some sacrifice. Above all, let us all regard ourselves as the conservators of a system which has been the glory of our race these many centuries, rather than agents for its destruction in order to gain some advantage for the client of the moment. Let us not lose sight of the big, ultimate object in the detail just next us. Surely the duty to the client ought not to carry the lawyer to the point of seeking to induce the court to depart from an old and firmly-established principle of our common law by means of ingenious shifts and devices. The lawyer is too prone to forget, in his zeal for the client, that he, as well as the judge, is a part of the machine for perpetuating and building up the system of precedent, and that it is his duty, as well as that of the judge, to do nothing to destroy or mar the integrity and symmetry of that structure.

When we reflect on the difficulties which seem inevitable if we abandon or abuse this system of precedent that has been handed down to us, is it too much to expect or hope that the profession will make the requisite effort to put the system on its feet again, even against the obstacles we know we face?

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HUSBAND'S DUTY TO REIMBURSE WIFE FOR EXPENDITURES FOR NECESSARIES. — It is a well-settled principle of the common law that a husband is under legal obligation to furnish necessaries for the maintenance of his wife, in the absence of misconduct on her part;[1] and the modern legislation enlarging the scope of a married woman's powers has not lessened the extent of this obligation.[2] And where the husband fails to perform his duty, the wife may pledge his credit for necessaries. This right has been based on a doctrine of implied agency,[3] or agency by necessity,[4] but is more properly regarded as a personal right inherent in the wife, created by law and in no way dependent upon the existence of an agency in fact.[5] But by the generally accepted doctrine, the husband is not liable where necessaries are furnished the wife on her personal credit,[6] or that of a third party.[7] And some courts of law hold that money loaned to a wife is not a necessary, even though borrowed for the express purpose of purchasing necessaries,[8] but in other jurisdictions the contrary result has been reached when the money was actually so expended.[9] And when

[1] The obligation persists even though he is imprisoned, Ahern *v.* Easterby, 42 Conn. 546; or insane, Read *v.* Legard, 6 Exch. 636; or has attempted to free himself from the duty by express contract with her, Ryan *v.* Dockery, 134 Wis. 431; and the fact that she possesses a separate estate is immaterial, Ott *v.* Hentall, 70 N. H. 231; although some courts have held that where she lives apart from him for just cause, the existence of an ample estate relieves him of his duty. Hunt *v.* Hayes, 64 Vt. 89.

[2] Flynn *v.* Messenger, 28 Minn. 208.

[3] Pierpont *v.* Wilson, 49 Conn. 450.

[4] East *v.* King, 77 Miss. 738.

[5] See Cromwell *v.* Benjamin, 41 Barb. (N. Y.) 558.

[6] Weisker *v.* Lowenthal, 31 Md. 413. *Contra*, Edminston *v.* Smith, 13 Idaho 645.

[7] Harvey *v.* Norton, 4 Jurist 42.

[8] Marshall *v.* Perkins, 20 R. I. 34.

[9] Kenny *v.* Meislahn, 69 N. Y. App. Div. 572.

this is the case, practically all courts of equity now permit a recovery by an application of the principle of subrogation.[10]

But if the husband's credit is worthless the wife's rights are not, in the absence of statute, adequately protected, for if a divorce or legal separation is not desired she cannot generally enforce her right of support directly against the husband. Some jurisdictions allow a bill in equity for maintenance,[11] but no action at law for damages has ever been given her when there is a breach of the legal duty.[12] In a recent case, a wife, abandoned without just cause, who secured necessaries with the proceeds of her own labor and separate estate, was allowed to recover at law the amount so expended on the ground of subrogation to the rights of the third party furnishing the necessaries. *De Brauwere* v. *De Brauwere*, 44 N. Y. L. J., Nov., 1910 (N. Y. Sup. Ct.). Granting the right of the third party to recover from the husband, and the recognition at law of the doctrine of subrogation, the case is clearly one for the application of the principle that one, other than a mere volunteer, who for his own protection pays a debt which in good conscience should have been satisfied by another, becomes subrogated to the creditor's right against the other.[13] That the wife is not a volunteer in such a case is apparent, since it is only the instinct of self-preservation and not a desire to confer gratuitous benefits which leads her to perform his obligation. Subrogation has been allowed where a third party advances money for necessaries,[14] and certainly the wife should stand in no worse position than any other creditor of the husband.[15] And where a wife becomes liable for the payment of her husband's debt by signing notes as a joint maker with him, it being shown that she is only a surety thereon, a satisfaction of the notes with her own money entitles her to be subrogated to the holder's rights against the husband.[16]

The decision in the main case is based on established legal principles and accords with sound public policy, and it is only the tardiness of the law in coming to such a conclusion that calls for comment. It is submitted, however, that the husband's liability in all these cases should be based on principles of quasi-contract to prevent his unjust enrichment rather than upon the technical doctrine of subrogation.

MAY STATE OF DOMICILE TAX GIFTS MADE ABROAD WHEN THE PROPERTY IS LOCATED ABROAD. — Since the case of *Union Transit Company* v. *Kentucky*,[1] it has been clear that property cannot be taken under the guise of taxation, except where benefit has been conferred by the state upon the person taxed, and that the general benefits conferred by a state upon those domiciled within its borders are not sufficient to support a

[10] Deare *v.* Soutten, L. R. 9 Eq. 151; Kenyon *v.* Farris, 47 Conn. 510. *Contra*, Skinner *v.* Tirrell, 159 Mass. 474. This case may be distinguished on the ground that the money was advanced on the wife's credit.

[11] Galland *v.* Galland, 38 Cal. 265.

[12] Decker *v.* Kedly, 148 Fed. 681.

[13] Cole *v.* Malcolm, 66 N. Y. 363, 366.

[14] Kenyon *v.* Farris, *supra*.

[15] Manchester *v.* Tibbets, 121 N. Y. 219.

[16] *In re* Nickerson, 116 Fed. 1003.

[1] 199 U. S. 194.

tax based in any way upon property permanently located abroad. It seems that this principle must have been overlooked in the recent decision of *In re Buller's Estate*, 128 N. W. 109 (Wis.). Wisconsin, copying the New York statute, has extended the ordinary inheritance tax to gifts in contemplation of death, or to take effect, in possession or enjoyment, at or after the death of the donor.[2] This is proper enough in cases where both the transaction and the property are within the state of Wisconsin, because the right of the sovereign to exact a return for the legal validation of such transactions is well settled. So too the tax would be good, regardless of where the limitation occurred, if the property given were in fact located in Wisconsin.[3] And if the property transferred were stock in a Wisconsin corporation, even though the certificates themselves, and the actual corporate property, and the formal gift were all outside the state, nevertheless the tax could be supported on the ground that the state was exacting compensation from the donee for the privilege of doing business under a limited liability.[4] But the principal case went far beyond any of these. There the donor was, to be sure, domiciled in Wisconsin, but the personal property which was given was at all times located in Illinois. By a deed executed in Illinois, he transferred his property to a resident of Illinois, in trust for named beneficiaries. It is difficult to see how Wisconsin could have any jurisdiction whatever over that transfer. Note that the case is wholly unlike a real descent of personalty. There most jurisdictions permit the estate of a non-resident decedent to be distributed under the laws of his domicile. Thus the state of the domicile actually assists in the transfer, and may properly tax it.[5] But in the case of realty it is well settled that mere domicile gives no right to tax the inheritance, because the transfer of realty is accomplished by the law of its *situs* alone.[6] This transaction *inter vivos* drew its whole validity from the law of Illinois,[7] and, following the analogy of descents of realty, ought to have been subject only to Illinois taxation.

Even though we admit that the intent of the donor was to evade Wisconsin taxes, that ought to make no difference in such a case as this. The intent cannot bring the transaction *inter vivos*, which in fact took place in Illinois, constructively back into Wisconsin, any more than it can bring back to the United States whiskey sent to Germany to escape the Excise Tax.[8]

The doctrine of the principal case amounts to this: that the state of domicile may pursue a man wherever he may go, and tax all his dealings wherever transacted, with personal property wherever situated. The only authority cited that really upholds so remarkable an extension of the taxing power is the following *dictum* by Denio, J.: "Personal property has no locality. It is subject to the law which governs the person of its owner, as well in respect to the disposition of it by act *inter vivos*, as its

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[2] Sanborn's Statutes Supp. (Wis. 1906), § 1087–1.

[3] Matter of Morgan, 150 N. Y. 35; Hoyt *v.* Tax Commissioners, 23 N. Y. 224.

[4] Matter of Bronson, 150 N. Y. 1.

[5] *In re* Estate of Swift, 137 N. Y. 77; *In re* Corning's Estate, 23 N. Y. Supp. 285.

[6] *In re* Estate of Swift, *supra*.

[7] Thus the validity of a gift *causa mortis* is determined by the law of the place where it is made, and not by the law of the domicile of the maker. Emery *v.* Clough, 63 N. H. 552.

[8] Selliger *v.* Commonwealth of Kentucky, 213 U. S. 200.

transmission by will." [9] This statement, so far as it relates to transactions *inter vivos* was a *dictum*, conspicuously *obiter*, unsupported by the authorities cited,[10] and palpably erroneous in view of modern decisions.[11]

APPORTIONMENT OF AN ANNUITY BETWEEN CAPITAL AND INCOME. — In the settlement of estates the contingent and deferred nature of life [1] annuities has frequently made the application of well-established principles extremely difficult. Annuities may be granted during the life of the testator or he may bequeath them as legacies. In the latter case the problem resolves itself into an attempt to determine his exact intention. Did he intend the annuity to be charged on his realty,[2] or personalty,[3] on the income,[4] or the *corpus* [5] of his estate; or that the annuitant might demand security for the payment of the future instalments of the annuity,[6] or compel its commutation into a lump sum? [7] In England the custom of granting marriage portions in the form of life annuities frequently brings up the former case. As the annuity is charged in the lifetime of the testator, his death leaves it as a debt upon his estate.[8] When the residuary estate is divided between a tenant for life and a remainderman the method of its payment has so perplexed the courts that two distinct rules [9] have sprung up, both professing to be the exemplification of the same legal principles.

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[9] Parsons *v.* Lyman, 20 N. Y. 103, 112. Cited in Cross *v.* Trust Co., 131 N. Y. 339, and in *In re* Corning's Estate, 23 N. Y. Supp. 285. See also Edgerly *v.* Bush, 81 N. Y. 199.

[10] The authorities he cited bore only on the real point of that case, namely, that in cases of descent by will or otherwise, the law of the domicile usually prevails. But note that this is not necessarily so. In fact in Illinois, where this transaction occurred, personalty descends by the law of Illinois regardless of the domicile of the owner. Cooper *v.* Beers, 143 Ill. 25. Hence, even if this had been a transfer by descent instead of a transfer *inter vivos*, it would seem that Wisconsin could not have taxed the transfer because the law of Wisconsin did not assist in it. There is no case directly in point, but this is the inevitable conclusion of the reasoning in *In re* Estate of Swift, *supra*.

[11] Emery *v.* Clough, 63 N. H. 552; Cooper *v.* Beers, *supra;* McCollum *v.* Smith, Meigs (Tenn.) 342; Cammel *v.* Sewell, 5 H. & N. 728; Marvin Safe Co. *v.* Norton, 48 N. J. L. 410; Harvey *v.* Richards, 1 Mason (U. S.) 381. The inaccurate statement that the tax is a tax on the right to "receive" property makes it doubtful whether the court did not attach some weight to the fact that the donees were residents of Wisconsin. It is hard to see how such reasoning could be supported. See Matter of Green, 153 N. Y. 223.

[1] It seems interesting to note that the British "consols" are perpetual annuities. The theory is that the Government need never return the principal but must continue to pay the income forever. Statutes 27 Geo. II, c. 27. Obviously, they involve no contingency.

[2] *In re* Nathan's Estate, 4 Pa. Dist. R. 149; Ley *v.* Ley, L. R. 6 Eq. 174.

[3] Paget *v.* Hurst, 9 Jur. N. S. 906.

[4] Baker *v.* Baker, 6 H. L. Cas. 616; Nudd *v.* Powers, 136 Mass. 273; Irvin *v.* Wollpert, 128 Ill. 527; Delaney *v.* Van Aulen, 84 N. Y. 16.

[5] Howarth *v.* Rothwell, 30 Beav. 516; Pierrepont *v.* Edwards, 25 N. Y. 128; Byam *v.* Sutton, 19 Beav. 556; Phillips *v.* Gutteridge, 3 De G. J. & S. 332; Peason *v.* Hellliwell, L. R. 18 Eq. 411; *In re* Watkins Settlement, 55 Sol. J. 63, 73.

[6] Morgan *v.* Pope, 7 Coldw. (Tenn.) 541; *In re* Parry, 42 Ch. D. 570.

[7] Wakeham *v.* Merrick, 37 L. J. Ch. 45; Ford *v.* Batley, 17 Beav. 303; Stokes *v.* Cheek, 28 Beav. 620.

[8] *In re* Poyser, [1908] 1 Ch. 828.

[9] Rule I. — Calculate what sum if set aside at the testator's death would, with

The conception that every future or contingent interest has a real present value is, of course, the basis of business in general and banking and insurance in particular. Mortality tables present a method for discounting life interests with great accuracy.[10] And so the various rights here under consideration can be reduced to a common basis, as mixed fractions are to a common denominator. The present or actuarial value of the annuity [11] will be called *a*, that of the life tenant's interest *b*, and that of the remainderman's *c*. Their sum must equal the gross residue. The clear residue of the estate is found by subtracting sum *a* from the gross residue, and the life tenant is entitled to the income of this clear residue. Now if the will permits the executors to buy an annuity from an insurance company with sum *a*, no further difficulty is encountered.[12] But ordinarily this risk must be borne by the life tenant or remainderman or both. A recent English case, while adopting Rule I,[9] has said the method of apportionment lies in the discretion of the court. *In re Poyser*, [1910] 2 Ch. 444. While it is correct for the court to apportion the *risk* involved in the annuity in any way that it sees fit, provided the parties are compensated for assuming it, the court has no right to change the *burden* [13] of the annuity, for that would be varying the value of the legacies. Theoretically, then, the life tenant is entitled to the income of the clear residue, and if he is to assume part of the risk of the annuity he must be paid a proportionate part of *a*, but as it was not the testator's intention to give him a lump sum, this amount must be changed into an annuity dependent on his own life. Likewise the remainderman's compensation must be translated into an insurance accruing on the death of the life tenant, for until then he is not entitled to anything. These can both readily be done if the apportionment of the principal annuity has been in the ratio of *b* and *c*, for then the annuity and insurance of sum *a* would be reciprocal, both depending on the same contingency and respectively equivalent to the income and principle of *a*. This then is the analytical justification of Rule II.[14] Rule I unduly favors the life tenant.[15] But it is

simple interest to the day of payment have met the particular instalment of the annuity. Charge that sum to capital and the balance to income. Allhusen *v.* Whittell, L. R. 4 Eq. 295; *In re* Harrison, 43 Ch. D. 55; *In re* Perkins, [1907] 2 Ch. 596; *In re* Thompson, [1908] W. N. 195; *In re* Poyser, [1910] 2 Ch. 444.

Rule II. — Apportion each instalment of the annuity between income and capital in proportion to the actuarial values of the life tenant's and remainderman's interests. *In re* Muffett, 39 Ch. D. 534; Yates *v.* Yates, 28 Beav. 637; Arathoon *v.* Dawson, [1906] 2 Ch. 211.

[10] The Northampton and Carlisle tables are those most frequently used. See GIAUQUE AND MCCLURE'S PRESENT VALUE TABLES, based on the latter, in which the values of life interests, contingent and vested, have been carefully calculated.

[11] To be calculated as at the death of the testator.

[12] *In re* Bacon, 62 L. J. (Ch.) 445; *In re* Henry, [1907] 1 Ch. 30. Sum *a* is raised by mortgaging the principal.

[13] A covenant to pay an annuity involves both a burden and a risk. A covenant to pay a fixed sum involves a burden only, while a covenant to pay, in consideration of a certain sum, double that sum or nothing depending on a contingency equally probable to happen or not, theoretically involves nothing but a risk.

[14] See note 9, *supra*. The shares of the instalments of the annuity chargeable to principal cannot be paid directly but only by successive mortgages upon it, for otherwise a future interest would be enjoyed in the present. This has not been brought out distinctly by the cases that have adopted Rule II. The interest due on the mortgages must be met by subsequent mortgages.

[15] For example, if the gross residue of an estate were $100,000, the income $4000, the

submitted that the real difficulty occasioned by these cases is the uncertainty introduced into the administration of estates, and that a statute embodying either rule would undoubtedly be welcomed by conscientious trustees.

RESTRICTIONS UPON THE VENDOR OF GOOD WILL. — It is sometimes held that the vendor of the good will of a business is under no special obligations with regard to it after the sale, aside from those fixed by the law of unfair competition, and may at once re-enter business on even terms.[1] But good will consists not merely of the chance of trade arising from the existence of the business as a going concern, distinct from the individual who carries it on, but also of the opportunities arising from the reputation of the proprietor.[2] This latter element, nearly always present, is often of the greatest importance,[3] and most courts endeavor to include it in such a sale. Though it is obvious that the good feeling of one man toward another cannot be transferred, yet the competitive power of the vendor, which if exercised would include the essence of this good will,[4] can be restricted or destroyed. And in Massachusetts a voluntary vendor is precluded from setting up a competitive business if it is found that it will impair the good will sold.[5] This, unfortunately, is not general law, and in the absence of an express provision in the contract of sale, most courts allow the vendor to re-enter the same trade.[6] A less severe restriction would be to prevent the vendor from dealing with the customers of the old business. Though this disregards the fact that good will is valuable because of the attraction of new patrons by the reputation of the business as well as because of the custom of the old ones, in the cases where it has been urged it has been overthrown as too broad a restriction.[7] The commonest limitation restricts the vendor only from soliciting the customers of the old business.[8] This seems to go too far or not far enough.

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annuity $2000 a year and the life tenant was 23 years old, Rule II would correctly give him a uniform income of about $2564. For on a four per cent basis such a life tenant's interest would be to the remainderman's as 71.8 is to 28.2. Rule I would give him about $3923 the first year, and less and less each year thereafter, for it treats each instalment of the annuity as if it were a separate and unexpected debt, falling suddenly upon the estate. It is to be observed that under neither rule is the age of the annuitant material.

[1] Williams *v.* Farrand, 88 Mich. 473; Cottrell *v.* Babcock Printing Press Co., 54 Conn. 122; Bergamini *v.* Bastian, 35 La. Ann. 60. See ALLEN, GOODWILL, 32.

[2] See Morgan *v.* Schuyler, 79 N. Y. 490, 493; Slack *v.* Suddoth, 102 Tenn. 375, 378; ALLEN, GOODWILL, 5, 42.

[3] Even in a mercantile business all the good will may be attached to the person. Brett *v.* Ebel, 29 N. Y. App. Div. 256.

[4] See STORY, PARTNERSHIP, § 99; 20 HARV. L. REV. 172.

[5] Old Corner Book Store *v.* Upham, 194 Mass. 101; Foss *v.* Roby, 195 Mass. 292. *Cf.* Townsend *v.* Hurst, 37 Miss. 679.

[6] Ranft *v.* Reimers, 200 Ill. 386; Zanturjian *v.* Boornazian, 25 R. I. 151. See Washburn *v.* Dosch, 68 Wis. 436, 439; Jackson *v.* Byrnes, 103 Tenn. 698, 700.

[7] The principal case; Leggott *v.* Barrett, 15 Ch. Div. 306.

[8] Trego *v.* Hunt, [1896] A. C. 7; Althen *v.* Vreeland, 36 Atl. 479 (N. J.); Ranft *v.* Reimers, *supra*. See, Zanturjian *v.* Boornazian, *supra*. The vendor will be enjoined from soliciting even the trade of those old customers who have already begun dealing with him again, Curl Bros. Ltd. *v.* Webster, [1904] 1 Ch. 685; and from soliciting the correspondents as well as the customers of the old firm, Mogford *v.* Courtenay, 45 L. T. R. N. S. 303. See 9 HARV. L. REV. 479.

There is no consistency in allowing the vendor to enter into a competitive business then to bar him from the most effective means of success; to allow him to diminish the good will sold by advertising but not by solicitation.[9] Yet this restriction was recently enforced by the New York Court of Appeals in reversing the ruling of the Appellate Division.[10] *Von Bremen* v. *MacMonnies*, 200 N. Y. 41.

In theory these personal restrictions are usually considered as implied agreements by the vendor, not as incidents to the transfer of the property rights.[11] So when the transfer is involuntary, as through the trustee in bankruptcy, all courts leave the vendor as free as an outsider to re-engage in business.[12] But from the facts in the cases it appears that most courts have been inclined to lay down practically a rule of law that the restrictions discussed will or will not be "implied" in the voluntary sale of good will, thus making possible the classification above outlined. This error in practice has been caused in this country by following too closely the cases in England. It was there early established,[13] though since frequently regretted,[14] that the restraint which seems the most natural one, against establishing a competing business, could never be implied. Not free always to enforce the actual intent of the parties, the courts in their anxiety to protect the purchasers now apply their half-way measure with apparently undiscriminating regularity.[15] But the courts in this country, not bound by the English precedents, should have no such hard and fast rules to apply to the sale of so intangible and variable a thing as good will, and should endeavor to protect the purchaser to the full extent intended in each case and no further.

Habit as Evidence of an Act. — Habit, as evidence, shades off into (1) similar occurrences, (2) character, (3) custom, which may be regarded as a sort of composite habit of a group of persons. The distinctions between these topics can be made clear more easily by illustrations than by definitions. Suppose the issue to be whether X was intoxicated on a particular Saturday night. Evidence that he was seen to drink at some other particular time would be evidence of a similar occurrence. That he was temperate in all things would be evidence of character. That in his social set, banquets were invariably closed by drinking a toast to the King in whisky straight would be evidence of custom. That he spent his wages for liquor every Saturday night, or that he became intoxicated occasionally would be evidence of habit.

Habit may sometimes be shown to prove either what act a given person did, or what person did a given act. Evidence of handwriting

[9] See Williams *v.* Farrand, *supra.*

[10] *Accord*, Von Bremen *v.* MacMonnies, 138 N. Y. App. Div. 319. Similar recent New York decisions are: Kates *v.* Bok, 139 N. Y. App. Div. 640. *Contra*, Goetz *v.* Ries, 123 N. Y. Supp. 433.

[11] See Hutchinson *v.* Nay, 187 Mass. 262, 265; Ginesi *v.* Cooper, 14 Ch. Div. 596, 600.

[12] Hutchinson *v.* Nay, *supra;* Walker *v.* Mottram, 19 Ch. Div. 355. But the involuntary vendor is bound to refrain from unfair competition. Hudson *v.* Osborne, 39 L. J. Ch. N. S. 79.

[13] Cruttwell *v.* Lye, 17 Ves. 335. See Harrison *v.* Gardner, 2 Madd. 198, 219.

[14] See Harrison *v.* Gardner, *supra;* Trego *v.* Hunt, *supra.*

[15] Jennings *v.* Jennings, [1898] 1 Ch. 378; Gillingham *v.* Beddow, [1900] 2 Ch. 242; Curl Bros. Ltd. *v.* Webster, *supra.*

belongs in this second class. The admissibility of evidence of habit depends largely on its remoteness. The habit of occasional intoxication is logically relevant. It makes a belief that X was drunk on the particular occasion more likely, but more likely by so little that the evidence is hardly worth the time consumed in hearing it. Hence it is often excluded.[1] Proof of a habit of invariably doing the same thing under circumstances like those of the case at issue is less remote and hence more likely to be admitted. This is most frequently true of acts that are largely mechanical, as mailing letters left in a certain place,[2] or of acts without moral significance, as spelling a word a certain way,[3] and which are therefore the subjects of the strongest habits; or of business transactions, as accepting drafts in writing only,[4] for men are generally more methodical about their business than about other affairs. Since strength of habit depends partly on frequent repetition, that too has a bearing on probative value. Thus the practice of getting drunk every Saturday night might be admitted by a court which would exclude evidence of so doing every New Year's Eve. Again, remoteness varies inversely with the definiteness of the circumstances under which the act is habitually done; for the vaguer these circumstances are the harder it is to say that there is any habit as distinguished from mere coincidence. These matters are all questions of degree; the decisions are by no means uniform; and in each case the discretion of the judge should play a large part.

Once having determined that the habit is competent evidence of the act, the court applies the same rules to evidence of the habit as to evidence of any other relevant fact. A recent Pennsylvania case introduces a further refinement peculiar to this point. *Moyer* v. *Berndt*, 19 Pa. Dist. R. 869 (Pa., C. P., Berks Co.). Following earlier *dicta*[5] it holds that habit is not admissible to prove an act, unless there is also direct evidence of the act, but concedes that it would be admissible to corroborate direct evidence. The use of habit as a substitute for the witness' present recollection may be compared with the use of a contemporary record for the same purpose. In the absence of present recollection, a witness may testify that he did the act because it was his invariable habit to do so, or because he had entered a record of the transaction.[6] The record alone would be kept out by the hearsay rule; but that does not apply to the habit standing alone. Indeed, it is hard to see a reason for the principal decision, unless the habit was such remote evidence that without more no reasonable jury could find that the act was done.[7]

QUO WARRANTO AND MANDAMUS FOR OFFICES AT WILL. — The books contain many conflicting rules regarding jurisdiction to issue the writ of

[1] Kingston *v.* Ft. Wayne, etc., Co., 112 Mich. 40. *Contra*, Smith's Executor *v.* Smith, 67 Vt. 443

[2] Bell *v.* Hagerstown Bank, 7 Gill (Md.) 216.

[3] Brookes *v.* Tichborne, 5 Exch. 929.

[4] Smith *v.* Clark, 12 Ia. 32.

[5] See Meighen *v.* The Bank, 25 Pa. St. 288; Eureka Insurance Co. *v.* Robinson, 56 Pa. St. 256.

[6] Shore *v.* Wiley, 18 Pick. (Mass.) 558.

[7] On very similar facts, the evidence was admitted in Lucas *v.* Novosilieski, 1 Esp. 296.

mandamus, several of which are considered in a recent Irish case. A board of justices had the duty of electing a clerk, removable at its pleasure. Certain ineligible justices voted, converting what would otherwise have been a tie between A and B into a plurality for A, and A entered upon the office. On B's application, the court refused to issue a writ of *quo warranto* against A, but granted a *mandamus* to compel the board to hold another election. *The King* (*Roycroft*) v. *Justices of Schull, etc.*, [1910] 2 Ir. 601.

The usual remedy for a person wrongfully excluded from office by a rival candidate is *quo warranto*.[1] Many cases, however, have held that where any incumbent can be removed at the pleasure of the appointing power and a new officer appointed, a judgment of ouster may easily be frustrated, and therefore should not be given.[2] Assume that three persons have the right to elect an officer removable at their pleasure, that two of these vote for B and one for A, and two other persons, having no right to do so, vote for A and A is declared elected. One of the rightful voters could probably by *quo warranto* proceedings oust the intruders from the body,[3] and then the three proper voters could remove A and elect B. While it seems undesirable that B's only hope should be that this course will be taken, nevertheless, it is a hard and fast rule that *quo warranto* will not issue in disputes concerning offices at will.[4]

It is sometimes said that *mandamus* should be granted in disputes concerning offices where no other adequate remedy is available.[5] Ordinarily *mandamus* is a writ of command directing the performance of a duty.[6] It often issues to compel a board to hold an election.[7] But where the office is occupied, the objection is raised that such a command would merely result in putting two persons in office, both claiming title, and that it is not the function of *mandamus* proceedings to settle title.[8] On this ground, perhaps, some courts would have refused *mandamus* even in cases where *quo warranto* would not issue.[9] Courts have, however, issued *mandamus* where they were satisfied that the election was void or merely colorable;[10] but it is hard to say how far they are willing to go into the question of the validity of the election.[11] Several states have solved the difficulty by settling the whole dispute in *mandamus* proceedings.[12] To do this they have occasionally disregarded the generally accepted rule that *mandamus* should not issue where there is another remedy, because they consider the delay incidental to first bringing a petition for *quo warranto*

[1] Darley *v.* The Queen, 12 Cl. & F. 520; The State *v.* Stewart, 6 Houst. (Del.) 359.
[2] Bradley *v.* Sylvester, 25 L. T. N. S. 459; The Queen *v.* Bayly, [1898] 2 Ir. 335.
[3] See HIGH, EXTRAORDINARY LEGAL REMEDIES, § 630.
[4] See cases under note 2, *supra*.
[5] See The Queen *v.* Hertford College, 3 Q. B. D. 693, 704–705; Harwood *v.* Marshall, 9 Md. 83, 98.
[6] See HIGH, EXTRAORDINARY LEGAL REMEDIES, § 1.
[7] The King *v.* Corporation of Bedford, 1 East 79; Atty.-Gen. *v.* City Council, 111 Mass. 90.
[8] See The King *v.* Beer, [1903] 2 K. B. 693; Commonwealth *v.* County Commissioners, 5 Rawle (Pa.) 75.
[9] See The King *v.* Stoke Damerel, 5 A. & E. 584, 591.
[10] See The Queen *v.* Gov't Stock Investment Co., 3 Q. B. D. 442; Commonwealth *v.* County Commissioners, *supra*, 77.
[11] See SHORTT, CRIMINAL INFORMATIONS, 122.
[12] Keough *v.* Holyoke, 156 Mass. 403; Lawrence *v.* Hanley, 84 Mich. 399; Harwood *v.* Marshall, *supra*.

as fatal to its adequacy.[13] Although settling the whole matter necessitates giving a judgment in the nature of ouster against the incumbent,[14] this is open to no substantial objection if all the parties interested have had a chance to be heard.[15]

Some authorities have refused to issue the writ of *mandamus* for offices at will; [16] and, indeed, the reasons for refusing *quo warranto* apply equally to *mandamus*. It is consequently curious that the court in the principal case found refuge in *mandamus*, but as all the parties had been in court and the election of a person other than the incumbent would amount to his amotion, the remedy was proper and effective.[17] Courts should have a wide field of discretion over the extraordinary legal remedies, and it is unfortunate that artificial rules have so often deprived them of jurisdiction.[18]

THE NATURE OF THE RIGHT IN A DEAD BODY. — The common law of England recognizes no property rights in a dead body.[1] Thus, while to steal the coffin or winding sheet of the dead is larceny, it is not so to steal the corpse itself.[2] And there are indications that even the relatives' right to possession of the corpse for purposes of burial has not always been adequately protected.[3] In England, however, all questions relative to the disposition of dead bodies were under ecclesiastical law; [4] hence English cases are not very helpful in a country having no ecclesiastical courts, for there rights in dead bodies must be protected, if at all, by civil remedies.[5] The legal duty of the surviving spouse or next of kin to bury the deceased predicates a legal right to do so, and it is well established in our law that an action lies for wrongfully detaining a corpse awaiting burial,[6] or for mutilation of it by unauthorized autopsy,[7] or otherwise.[8] Moreover, the legal right being recognized, courts of equity will act where the remedy at law is inadequate. For example, whether or not a corpse be regarded as becoming on interment a part of the soil in which it lies,[9] equitable remedies alone can properly protect whatever rights exist in it thereafter.[10]

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[13] See Luce *v.* Board of Examiners, 153 Mass. 108, 110; Lawrence *v.* Hanley, *supra*, 403.

[14] See The Queen *v.* Hertford College, 2 Q. B. D. 590, 605; Keough *v.* Holyoke, *supra*, 408.

[15] See Brown *v.* Bragunier, 79 Md. 234, 242; Harwood *v.* Marshall, *supra*, 100.

[16] Rex *v.* Wheeler, 3 Keb. 360; The State *v.* Champlin, 2 Bailey's Law (S. C.) 220. See SHORTT, CRIMINAL INFORMATIONS, 275.

[17] *Accord*, *In re* Barlow, 30 L. J. Q. B. 271; Regina *v.* Strabane Urban Dist., 35 Ir. L. T. Rep. 12.

[18] See *In re* Barlow, *supra*, 271.

[1] See 3 COKE'S INSTITUTES, 203; 2 BL. COMM. 429; Regina *v.* Sharpe, 7 Cox C. C. 214.

[2] Haynes's Case, 12 Coke 113.

[3] See 9 SOL. J. 3, describing instances in which corpses had been successfully withheld from the relatives for purposes of blackmail.

[4] *Cf.* Kemp *v.* Wickes, 3 Phillim. 264.

[5] See Law of Burial, 4 Bradf. Surr. (N. Y.) 503.

[6] Renihan *v.* Wright, 125 Ind. 536.

[7] Koerber *v.* Patek, 123 Wis. 453; Burney *v.* Children's Hospital, 169 Mass. 57.

[8] Hockenhammer *v.* Lexington & Eastern R. Co., 24 Ky. L. Rep. 2383; Louisville & Nashville R. Co. *v.* Wilson, 123 Ga. 62.

[9] Meagher *v.* Driscoll, 99 Mass. 281.

[10] Pierce *v.* Proprietors of Swan Point Cemetery, 10 R. I. 227; Wilson *v.* Read, 74 N. H. 322.

The right in the corpse has usually been defined as a right to "custody and possession," or as a "quasi-property right." [11] A recent Canadian case, however, goes further and bases its decision on the ground that the nearest relatives have a property right, limited to such exercise as shall conform to the duty out of which the rights arise. *Miner* v. *Canadian Pacific R. Co.*, 15 West. L. Rep. 161. And a late case in this country employs similar language.[12] The fact that a corpse is a physical thing and that the control of the nearest relative over it is exclusive [13] predicates a right of property in the broadest use of that term.[14] The principal case, however, recognizes that it would outrage decency and sentiments of reverence for the dead to regard that property right as absolute in its powers of disposition and transfer. An early *dictum* which did not so qualify it [15] has been justly criticized as commercial,[16] and most courts have preferred to speak only of a right of possession. Some considerations, however, indicate that it may be more accurate to regard a corpse as property subject to restrictions on its use. It is proper that a dead body should be the subject of larceny, and there is no reason, apart from the unwillingness of courts to use the word "property" in this connection, why it should not be so regarded. Moreover the restrictions upon the use of corpses as property vary in certain cases. In most states statutes provide for furnishing to medical institutions for purposes of dissection the bodies of executed felons and of those whose burial would be a public charge.[17] Cadavers so acquired are obviously property in a much less restricted sense than bodies merely awaiting burial. Perhaps even less restricted is the control of corpses or parts thereof which are preserved for purposes of exhibition, such as monstrosities, skeletons, or mummies.[18] Dead bodies in these forms are popularly regarded as property, because the reason for restricting the disposition of them has largely disappeared; and it would seem more consistent to regard every corpse as subject to property rights more or less limited according to the particular circumstances of its acquisition.

RECENT CASES.

ADVERSE POSSESSION — WHO MAY GAIN TITLE — WIFE AGAINST HUSBAND. — A husband on deserting his wife had given her an invalid deed to certain land. After occupying for the statutory period she conveyed to the plaintiff,

[11] Keyes *v.* Konkel, 119 Mich. 550, holding that replevin will not lie to recover a corpse.

[12] Pettigrew *v.* Pettigrew, 207 Pa. St. 313.

[13] Rousseau *v.* City of Troy, 49 How. Pr. (N. Y.) 492, denying an action by a more distant relative.

[14] See 1 SCHOULER, PERSONAL PROPERTY, 25; Larson *v.* Chase, 47 Minn. 307.

[15] See Bogert *v.* City of Indianapolis, 13 Ind. 134.

[16] See 10 HARV. L. REV. 51.

[17] For typical statutes of this nature see 4 CONSOL. LAWS OF N. Y. (1909), Publ. Health Law, § 316; MASS. REV. LAWS (1902), 689–690; MICH. PUBLIC ACTS (1901), No. 5 (1); CODE OF TENN., § 6775.

[18] Doodeward *v.* Spence, 9 N. S. W. 107, holding that detinue lies for the recovery of the body of a two-headed baby preserved in alcohol. But see an old case stated in 2 EAST P. C. 652. See 3 HALSBURY, LAWS OF ENGLAND, 405 note (r).

who sued to quiet title. The defendant claimed through the hu
statute either spouse may sue the other to recover his or her separa
and the accumulations of a wife are her separate property. *Held,*
had gained title by adverse possession. *Union Oil Co.* v. *Stewart,*
(Cal., Sup. Ct.).

Owing to the identity of interests and submersion of the wife's rights such a result would be entirely foreign to early common-law principles. Yet two jurisdictions hold that, the husband acquiescing, a wife may gain title by adverse possession without the aid of statutes. *Hartman* v. *Nettles*, 64 Miss. 495; *McPherson* v. *McPherson*, 75 Neb. 830. Others take the contrary view, since the land is jointly occupied and the husband remains the head of the family. *First National Bank of Santa Barbara* v. *Guerra*, 61 Cal. 109. But under a statute allowing the wife separate property, and a right to sue and be sued, she may recover from the husband for use and occupation of her land. *Skinner* v. *Skinner*, 38 Neb. 756. So title by adverse possession may be acquired where the parties are living apart under a void decree of divorce. *Warr* v. *Honeck*, 8 Utah 61. And without legislative enactment one state, at least, has relieved the wife of all marital disabilities on desertion by the husband. *Love* v. *Moynehan*, 16 Ill. 277. Such is the general rule when the husband abjures the realm. *Gregory* v. *Pierce*, 4 Met. (Mass.) 478. Since the basis of the rule as to disabilities disappears on abandonment by the husband, the principal case marks a justifiable step in the recognition of equal rights.

BANKRUPTCY — INVOLUNTARY PROCEEDINGS — WHEN DEBTOR MUST OWE $1000. — An insolvent debtor owing over $4000 made a general assignment, assented to by some of his creditors. The other creditors, whose claims aggregated less than $1000, filed a petition to have him adjudged a bankrupt. The Bankruptcy Act of 1898, § 46, provides that "any natural person except a wage earner or person engaged chiefly in farming . . . owing debts to the amount of one thousand dollars or over may be adjudged an involuntary bankrupt." *Held*, that the petition should be granted. *In re Jacobson*, 181 Fed. 870 (Dist. Ct., D. Mass.).

Courts have generally held that the time when one must be engaged in one of the excepted occupations, in order to be exempt, is the date of the creditors' petition. *In re Interstate Paving Co.*, 171 Fed. 604. Hence this should also be the time when $1000 must be owed, the two clauses in the same sentence offering no ground for distinction. Yet if courts adhered strictly to this requirement, the debtor would be enabled to settle with some creditors and leave the rest without remedy. In straining to avoid this result it has been held that voidable preferences are included among the creditors' debts at the time of the petition because they can be recovered by the trustee. *In re McMurtrey & Smith*, 142 Fed. 853. Yet such an assumption of the basis for bankruptcy is reasoning in a circle. Where a debtor, to avoid bankruptcy, goes into one of the exempt occupations, courts have made a judicial exception to the terms of the statute and refused him protection. *Tiffany* v. *La Plume Condensed Milk Co.*, 141 Fed. 444. See 23 HARV. L. REV. 393. Unfortunately there is equal necessity for judicial legislation in the case of preferences, and the principal case will undoubtedly be followed.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — LIFE INSURANCE POLICIES. — A bankrupt had policies of insurance on his life payable to his executors, administrators, or assigns, on which the insurance company had a valid lien for a greater amount than their cash surrender value. The Bankruptcy Act, § 70 a (5), provides "that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has

been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy." *Held*, that the policies do not pass to the trustee. *Burlingham* v. *Crouse*, 24 Am. B. Rep. 632 (C. C. A., Second Circ.).

Subject to the proviso above quoted, the interest of a bankrupt in a policy on his own life, payable to himself or his personal representatives, passes to his trustee. *In re White*, 174 Fed. 333. An exception, logically indefensible, is made where the policy has no present value. *Gould* v. *New York Life Ins. Co.*, 132 Fed. 927. The earlier cases regarded the proviso as defining what policies passed to the trustee, and held that policies having no surrender value did not pass. *In re Buelow*, 98 Fed. 86; *Morris* v. *Dodd*, 110 Ga. 606. But the weight of authority now rightly denies such scope to the proviso. *In re Slingluff*, 106 Fed. 154; *In re Welling*, 113 Fed. 189; *In re Orear*, 178 Fed. 632. The principal case would seem to be justified on the theory that Congress intended to secure to the bankrupt the benefit of his investment on his accounting for its surrender value to the estate, and that the existence of a valid lien to the amount of the surrender value excuses payment. It has been held that the failure to schedule policies pledged for more than their surrender value is not fraudulent concealment. *In re Adams*, 104 Fed. 72. The Supreme Court has construed the proviso liberally by allowing its benefits where no surrender value is contracted for but the company's practice is to pay cash on surrender. *Hiscock* v. *Mertens*, 205 U. S. 202.

Conflict of Laws — Personal Jurisdiction — Statute Authorizing Service Out of Jurisdiction. — The English Matrimonial Act provides that the co-respondent in divorce proceedings must be made a defendant and that service on him out of the country is sufficient. The defendant co-respondent was served in Scotland and objected that the court had not jurisdiction. *Held*, that such service confers jurisdiction on the English courts. *Rayment* v. *Rayment and Stuart*, [1910] P. 271.

Since the power of Parliament is supreme it may obviously grant jurisdiction to the English courts, in any cases it chooses, and the courts must carry out its commands. *Drummond* v. *Drummond*, L. R. 2 Ch. 32; *Ashbury* v. *Ellis*, [1893] A. C. 339. Any form of notice which the statute authorizes is sufficient, and it is even provided that, in the court's discretion, no notice whatsoever is necessary. 20 & 21 Vict. c. 85, § 42. But a judgment obtained in such a manner would be given no effect in other jurisdictions. *Buchanan* v. *Rucker*, 9 East 192; *D'Arcy* v. *Ketchum*, 11 How. (U. S.) 165. In the United States it has been repeatedly held that the Fourteenth Amendment necessitates a service in the jurisdiction in all personal actions. *Pennoyer* v. *Neff*, 95 U. S. 714; *Eliot* v. *McCormick*, 144 Mass. 10. Furthermore, as the courts and the legislature in the United States are regarded as co-ordinate branches of government, the former may reject, as an interference with their rights, such efforts to confer a fictitious jurisdiction on them. Thus, even before the adoption of the Fourteenth Amendment, such statutes granting jurisdiction over non-residents were disregarded. *Beard* v. *Beard*, 21 Ind. 321. But see *Dearing* v. *Bank of Charleston*, 5 Ga. 497.

Constitutional Law — Privileges and Immunities: Class Legislation — County Ordinance Prohibiting Fishing by Non-residents. — A statute permitted any county to pass ordinances forbidding fishing by non-residents within its limits. A county passed such an ordinance, and the defendant, a citizen of the state but a resident of another county, fished there. *Held*, that the statute is unconstitutional. *State* v. *Hill*, 53 So. 411 (Miss.).

Since *Magna Charta* it has been generally conceded that the royal prerogative did not entitle the king to grant exclusive fishing rights in navigable rivers.

See *Duke of Somerset* v. *Fogwell*, 5 B. & C. 875; 2 Bl. Comm. 39. *Cf. Rogers* v. *Jones*, 1 Wend. (N. Y.) 238. This privilege is held by the sovereign for the benefit of all his subjects, and *primâ facie* any one may fish in public waters. *Carter* v. *Murcot*, 4 Burr. 2162; *Polhemus* v. *Bateman*, 60 N. J. L. 163. But at an early date the legislature granted exclusive rights to individuals, or permitted towns to exclude non-residents. Body of Liberties, Art. 16, 28 Mass. Hist. Soc. Coll. 219; *Trustees of Brookhaven* v. *Strong*, 60 N. Y. 56. Where the grant is absolute or for a definite time, it is in the nature of a vested property right which cannot be disturbed during its term, and it is not a violation of the Fourteenth Amendment. *Lowndes* v. *Huntington*, 153 U. S. 1; *Hand* v. *Newton*, 92 N. Y. 88. As in the case of public lands, the state may grant to individuals rights in the public property. But if it gives only a revocable license, the state is merely tolerating a use of its property, — granting a privilege rather than a property right. *Slingerland* v. *International Contracting Co.*, 43 N. Y. App. Div. 215. Since the state holds the property for the benefit of all its citizens, it should not be allowed to restrict such a privilege to a few. *Cf. Harper* v. *Galloway*, 51 So. 226 (Fla.). *Contra*, *Commonwealth* v. *Hilton*, 174 Mass. 29. It could, of course, limit the privilege to citizens of the State. *Corfield* v. *Coryell*, 4 Wash. C. C. 371.

Corporations — Foreign Corporations — Jurisdiction over Internal Affairs. — A stockholder of a foreign corporation brought *mandamus* to compel the secretary and directors to hold a stockholder's meeting pursuant to the by-laws. The corporation had its principal office in the state, and the secretary and directors were resident there. *Held*, that the court has no jurisdiction over the corporation for this purpose. *State ex rel. Ferenez* v. *Unida Gold Mining Co.*, 32 Oh. Cir. Ct. R. 54.

As the corporation is a necessary party in an action by a stockholder to redress a grievance in the corporate management, such a proceeding is impossible unless service can be had upon the corporation. *Wilkins* v. *Thorne*, 60 Md. 253. And statutes requiring foreign corporations doing business in the state to maintain an agent therein on whom process may be served are construed by some courts as not giving jurisdiction over the internal affairs of such a corporation. *Sidway* v. *Missouri Land & Livestock Co.*, 101 Fed. 481. Usually, however, the courts recognize that they have jurisdiction, but decline to exercise it where so doing would involve, as here, ordering or restraining an act in a foreign jurisdiction, on the ground of inability to compel obedience and on the ground that the state of incorporation is the best judge of its own law governing such matters. *Kimball* v. *St. Louis & San Francisco Ry. Co.*, 157 Mass. 7. But when the transaction occurs in the state of the *forum* the latter reason has not always deterred the courts from granting relief. Thus they will compel the corporation to allow a stockholder access to its books when they are in the custody of an officer in the state. *State ex rel. Richardson* v. *Swift*, 7 Houst. (Del.) 137. And they will enjoin the carrying on of an *ultra vires* undertaking within the state when all the property and the directors are within the state. *Richardson* v. *Clinton Wall Trunk Mfg. Co.*, 181 Mass. 580.

Costs — Liability of Infant to Indemnify Next Friend. — The plaintiff as next friend of the defendant, an infant, properly instituted and conducted an action in the interest of the defendant, which was dismissed, with costs to be paid by the next friend. The plaintiff brought an action to recover those costs from the infant. *Held*, that the plaintiff can recover. *Steeden* v. *Walden*, [1910] 2 Ch. 393.

Apart from statute the weight of authority in England and this country seems to be that the next friend is liable for costs in the first instance. *Swain* v. *Follows*, 18 Q. B. D. 585; *Smith* v. *Gaffard*, 33 Ala. 168. However, a very respect-

able minority hold the infant. *Crandall* v. *Slaid*, 11 Met. (Mass.) 288; *Albee* v. *Winterink*, 55 Ia. 184. Since the next friend is held in the first instance in England, the principal case seems clearly right in allowing this action over against the infant. This is law in America. *Voorhees* v. *Polhemus*, 36 N. J. Eq. 456. If the question were *res integra* it would seem best to hold the infant liable for costs primarily, as he is the real party in interest. The next friend is merely an officer of the court. See *Davies* v. *Lockett*, 4 Taunt. 765; *Klaus* v. *State*, 54 Miss. 644. The objection that the next friend can sue without the infant's consent raises a broad question of policy, whether he should be restrained by imposing liability for costs. He certainly should not be unduly discouraged. *Cross* v. *Cross*, 8 Beav. 455. The infant's interests seem sufficiently guarded by charging the next friend when suits are improper. *Pearce* v. *Pearce*, 9 Ves. Jr. 548; *Campbell* v. *Campbell*, 2 Myl. & C. 25. There is also the additional protection that the court may remove the next friend whenever his conduct appears questionable. *Robinson* v. *Talbot*, 78 S. W. 1108 (Ky.); *Barwick* v. *Rackley*, 45 Ala. 215.

Criminal Law — Appeal — Sentence Increased on Appeal. — The Criminal Appeal Act of 1907 provided that on appeal by a prisoner, the higher court might quash the original sentence and pass another sentence warranted in law by the verdict (whether more or less severe). The prisoner appealed from a sentence of twelve years' imprisonment for shooting with intent to murder. *Held*, that the sentence can be increased to fifteen years. *Rex* v. *Simpson*, 74 J. P. 533 (Eng., Ct. Crim. App., Oct. 24, 1910).

Since the English courts have no power to declare unconstitutional an act of Parliament, the decision is unquestionably correct. In this country, such a statute would not deprive the prisoner of liberty without due process of law, for due process does not require any right to appeal. *Andrews* v. *Swartz*, 156 U. S. 272. Nor would it violate constitutional provisions against double jeopardy in those jurisdictions which allow conviction of a crime of higher degree (as murder) on a new trial after an appeal from conviction of a crime of lower degree (as manslaughter). *Trono* v. *United States*, 199 U. S. 521. See 19 Harv. L. Rev. 300. And even where the contrary is held, a strong argument might be made for the constitutionality of an increased sentence for the same crime on appeal or on a new trial. The statute in question seems a most sensible one, for it discourages frivolous appeals without forbidding meritorious ones, and it partially remedies the defect in our system of criminal law of denying to the prosecution a right of appeal.

Dangerous Premises — Liability to Trespassers — Injury by Vicious Animal. — The plaintiff, while walking across the defendant's field, was injured by the defendant's horse, which the defendant knew to be vicious. The public had been accustomed to use the field as a short cut, but the defendant had at times objected. The defendant had given no notice of the animal's vicious character. *Held*, that the plaintiff can recover. *Lowery* v. *Walker*, 55 Sol. J. 62 (Eng., H. L., Nov. 9, 1910).

American courts have held the owner of a vicious animal liable in such cases on the theory that even an admitted trespass by the plaintiff was no defense. *Marble* v. *Ross*, 124 Mass. 44; *Loomis* v. *Terry*, 17 Wend. (N. Y.) 497. As to the condition of the premises ordinarily, the landowner owes the trespasser no duty. *Lary* v. *Cleveland, etc. Ry. Co.*, 78 Ind. 323. He must warn the licensee, however, of hidden dangers of which he knows. See *Maenner* v. *Carroll*, 46 Md. 193. The line between the licensee and the merely technical trespasser is often very shadowy. It may not be unreasonable, therefore, to hold the landowner to the duty of giving notice of danger. But the further consideration of expediency arises, — how far the landowner shall be restricted in the

beneficial user of his land for the protection of those who come upon it without right. When the presence of the trespasser is known, or ought to be known, the landowner must use due care not actively to injure him. *Herrick* v. *Wixom*, 121 Mich. 384; *Fearons* v. *Kansas City Elevated Ry. Co.*, 180 Mo. 208. But where the defendant does not himself bring force to bear on the plaintiff, the user is beneficial, and the danger contingent and remote, the wisdom of imposing such liability on the landowner is questionable.

DEAD BODIES — NATURE OF RIGHT IN. — The plaintiff shipped the body of her deceased son by the defendants' railway and, through a mistake of its servants, the body was put off at the wrong station, causing delay and expense to the plaintiff. This action was for damages on account of the defendants' negligence. *Held*, that the corpse is the property of the plaintiff, subject to limitations upon its disposition and use, and that she can recover damages for the expenses incurred. *Miner* v. *Canadian Pacific R. Co.*, 15 West. L. Rep. 161 (Alberta, Aug. 8, 1910). See NOTES, p. 315.

DEATH BY WRONGFUL ACT — DAMAGES IN STATUTORY ACTION — RIGHT OF WIFE NOT SUPPORTED BY HUSBAND TO SUE FOR HIS DEATH. — The plaintiff's husband deserted her shortly after their marriage and thereafter contributed nothing toward her support. He was killed by reason of the defendant's negligence, and the plaintiff brought an action as beneficiary under the death statute. The court directed a verdict for the defendant. *Held*, that the case should have been submitted to the jury. *Ingersoll* v. *Mackinac Ry. Co.*, 128 N. W. 227 (Mich.).

In such a case the rule in Michigan is to allow no recovery, if no pecuniary damage is shown. *Hurst* v. *Detroit City Ry.*, 84 Mich. 539. The weight of authority gives the plaintiff nominal damages, but the Michigan rule seems sounder. The death statutes are framed to recompense the beneficiaries, and if there is nothing for which to recompense them there should be no action. There is a pecuniary damage here in the loss of the action which the wife might have brought at any time against her husband to force him to support her. The loss of the possibility of bringing an action is enough to create a reasonable probability that damage has been suffered, and hence presents a question for the jury, even though, in the final event, they should find that the wife would probably never have recovered anything from the deceased. This view is supported by other authority. *Baltimore & Ohio R. Co.* v. *State*, 81 Md. 371; *International & Great Northern R. Co.* v. *Culpepper*, 19 Tex. Civ. App. 182.

DIVORCE — DEFENSES — DELAY. — A husband, after an invalid divorce, married again. After knowing of this marriage for ten years the first wife sued for a divorce, charging adultery with the second wife within the last year. By statute such a suit must be brought within five years of the discovery of the offense, or if the defendant committed the offense outside the state, within five years after his return. *Held*, that a divorce be granted. *Ackerman* v. *Ackerman*, 44 N. Y. L. J. 1059 (N. Y., Ct. App., Nov. 22, 1910).

The majority of the court regarded the continuous cohabitation with the second wife as a single offense, and only allowed the plaintiff to sue because the defendant had been continuously out of the state. Three judges, however, concurred in the result on the ground that each act of adultery constituted a new cause of action. Strict logic favors this view, but on the authorities the rule seems to be that when charged with notice of the defendant's adulterous intercourse, although that relation exists at the date of the suit, the plaintiff cannot set up specific acts in that continuing intercourse as a ground for divorce after the statutory period. *Valleau* v. *Valleau*, 6 Paige (N. Y.) 207; *Dutcher* v. *Dutcher*, 39 Wis. 651. The delay of the aggrieved party has allowed the

defendant's unlawful relation to attain a permanency which the law prefers to protect rather than disturb. The defendant is held from irregular relations with other women than his second wife by the fact that any new offense will revive his first wife's cause of action. *Sewall* v. *Sewall*, 122 Mass. 156. See *Cooke* v. *Cooke*, 3 Swab. & Tr. 126.

ELECTRIC WIRES — APPLICATION OF THE PRINCIPLE OF FLETCHER *v.* RYLANDS. — The plaintiff, a steam railway company, used electric wires to transmit signals, etc. The defendant on a private right of way alongside began to operate an electric railway, necessarily using so strong a current that the plaintiff's signal system was interfered with. The plaintiff sought to enjoin the defendant from operating its railroad without devices to prevent the interference. *Held*, that the injunction will not be granted. *Lake Shore & Michigan Southern Ry. Co.* v. *Chicago, Lake Shore, & South Bend Ry. Co.*, 92 N. E. 989 (Ind.).

The court refused to apply *Fletcher* v. *Rylands* because that case has been discredited in some courts of this country, and because the defendant was a quasi-public corporation legally authorized to make a non-natural use of its land. But undoubtedly the defendant had collected on its land something likely to do mischief, and was allowing it to escape to his neighbor's damage. The real answer to the plaintiff's claim seems to be an affirmative defense of justification. *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186; *Cincinnati Inclined Plane Ry. Co.* v. *City & Suburban Telegraph Ass'n*, 48 Oh. St. 390; *Hudson River Telephone Co.* v. *Watervliet Turnpike & Ry. Co.*, 135 N. Y. 393. In these cases the defendant escapes because it is using the highway as it is legally authorized to do, and because it is furthering the dominant use of public travel while the telephone companies are making only a subordinate use of the highway. And so in the principal case the defendant, although not making use of a public street, was conducting in a reasonable manner a business essential to the community. The question is not one of responsibility but of justification. See 8 HARV. L. REV. 200, 208.

EVIDENCE — GENERAL PRINCIPLES AND RULES OF EXCLUSION — IRRELEVANCY: VIOLATION OF MUNICIPAL ORDINANCE. — The plaintiff was injured by falling into a hole in the sidewalk in front of a building owned by the defendant. A municipal ordinance required abutting owners to keep the sidewalks in repair. In an action to recover for the injury, the plaintiff introduced the ordinance as evidence of negligence. *Held*, that the evidence was improperly admitted. *English* v. *Kwint*, 44 N. Y. L. J. 847 (N. Y. App. Div., Nov. 1910).

Where the plaintiff is a member of the class for whose benefit the ordinance was passed, nearly all jurisdictions agree that the violation of a municipal ordinance, if it is the proximate cause of injury, is evidence of negligence. *Hamilton* v. *Minneapolis Desk Mfg. Co.*, 80 N. W. 693 (Minn.); *Conrad* v. *Springfield Consolidated Ry. Co.*, 88 N. E. 180 (Ill.). *Contra, Louisville & Nashville R. Co.* v. *Dalton*, 102 Ky. 290. Some courts hold it to be negligence *per se*. See *Pennsylvania Co.* v. *Hensil*, 70 Ind. 569. Others consider it *prima facie* evidence of negligence. *Chicago & Joliet Elec. Ry. Co.* v. *Freeman*, 125 Ill. App. 318. By the weight of authority it is simply some evidence for the consideration of the jury. *Biesegel* v. *New York Central R. Co.*, 14 Abb. Prac. (N. Y.) 29. Logically it would seem to be material only in cases where reliance on the observance of the ordinance would justify a relaxed standard of care on the plaintiff's part, and knowledge of such reliance would increase the defendant's duty to take care. *Phila. & Reading R. Co.* v. *Ervin*, 89 Pa. St. 71. In the principal case, the ordinance was not designed to protect the members of the public. *City of Hartford* v. *Talcott*, 48 Conn. 525. Its purpose was to secure the performance by property-owners of a duty imposed upon the city. *City of Keokuk* v. *Dis-*

trict of Keokuk, 53 Ia. 352. The defendant remained only under the common-law duty not to create an obstruction or defect in the sidewalk. Hence the court held rightly that the violation of the ordinance is of no evidential value on the question of negligence.

EVIDENCE — SIMILAR FACTS AND OCCURRENCES — HABIT. — In an action for arrears of wages, the defendant offered evidence that it was his habit to pay his laborers at regular intervals. There was no other evidence of payment. *Held*, that the evidence is inadmissible. *Moyer* v. *Berndt*, 19 Pa. Dist. R. 869 (Pa., C. P., Berks Co.). See NOTES, p. 312.

GOOD WILL — RESTRICTIONS ON VENDOR. — Two months before the termination of a trade partnership, two of the partners sold to the third their interest in the assets, good will, and other property of the firm. The purchaser understood that the retiring partners were to engage in a competitive business and the price paid was only slightly greater than the book value of the property transferred. The purchaser sought to enjoin the vendors from soliciting the trade of, or dealing with, the customers of the old firm. *Held*, that they will be enjoined from soliciting the trade of the old customers but not from dealing with them. *Von Bremen* v. *MacMonnies*, 200 N. Y. 41. See NOTES, p. 311.

HOMICIDE — RESPONSIBILITY FOR DEATH CAUSED BY FRIGHT. — The prisoner assaulted A, and thereby so frightened A's mother-in-law, who was near by, that she died from the shock. *Held*, that the prisoner was rightly convicted of manslaughter. *Ex parte Heigho*, 110 Pac. 1029 (Idaho).

The early English law did not hold responsible one whose unlawful act caused death by fright alone. 1 HALE, PLEAS OF THE CROWN, 429. This was probably due to a fear of encouraging prosecution for witchcraft. See STEPHEN, DIG. CRIM. LAW, 6 ed., Art. 242, n. 2. Later authority holds the defendant responsible in such a case, though where the point has arisen the victim was the one toward whom the defendant's threats of violence were directed. *Regina* v. *Dugal*, 4 Quebec 350. The principal case has taken the next logical step in applying the doctrine of the later cases where the person killed is not the intended victim. It may be difficult to prove that death was in fact the result of the unlawful act, but since the burden is on the state to prove its case beyond a reasonable doubt, the difficulty of proof only favors the prisoner. Once it is established that the defendant's unlawful act has in fact caused death, he should be responsible whether death was due to fright or to physical violence. *Cf.* *Regina* v. *Towers*, 12 Cox C. C. 530.

HUSBAND AND WIFE — CONTRACTS BETWEEN HUSBAND AND WIFE — VALIDITY OF SEPARATION AGREEMENTS. — The plaintiff sued for himself and as trustee of the defendant's wife on a bond, given to secure the performance of a separation agreement. When the agreement was made, to avoid scandal and notoriety the defendant and his wife occupied the same apartments but had ceased to have sexual intercourse. *Held*, that the bond is enforceable. *Levy* v. *Goldsoll*, 131 S. W. 420 (Tex., Ct. Civ. App.).

An agreement for future separation, made while the parties are living together, is void, but an agreement made after a separation has actually taken place is valid. *Grime* v. *Borden*, 166 Mass. 198. See 15 HARV. L. REV. 147. The reason for this doctrine against contracts for future separation is that it is against public policy to encourage married people to live apart. See *Bowers* v. *Hutchinson*, 67 Ark. 15, 24. That reason, of course, fails where the parties have already parted. But the cases do not fix any rule as to what constitutes sufficient present separation to enable a valid separation agreement to be made. In the principal case, however, it is obvious that the parties are merely nominally living together. The law regards very highly the importance of marital

intercourse. This may be shown by the fact that cohabitation without marital intercourse does not necessarily amount to condonation. *Guthrie* v. *Guthrie*, 26 Mo. App. 566. See 2 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 280. And Mr. Bishop even contends that on principle refusal of copulation should be ground for divorce for desertion. See 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, §§ 1676–1683. But in this position he is not supported by authority. *Southwick* v. *Southwick*, 97 Mass. 327.

HUSBAND AND WIFE — RIGHTS OF WIFE AGAINST HUSBAND AND IN HIS SEPARATE PROPERTY — RIGHT TO BE REIMBURSED FOR EXPENDITURES FOR NECESSARIES. — The plaintiff, a married woman, having been abandoned by her husband without just cause, and being unable to procure necessaries on his credit, purchased them with the proceeds of her labor and of her separate estate. She sought to recover from her husband the amount so expended. *Held*, that the plaintiff can recover, being subrogated to the rights of the persons who furnished the necessaries. *De Brauwere* v. *De Brauwere*, 44 N. Y. L. J., Nov. 1910 (N. Y. Sup. Ct.). See NOTES, p. 306.

INTERSTATE COMMERCE — CONTROL BY STATES — REGULATION OF RATES OF INTERSTATE FERRIES. — A New Jersey statute of 1799 empowered the boards of freeholders to fix the fares to be charged at ferry stations within their respective counties. The board of Hudson County fixed the rates to be taken by ferries plying between that county and New York City. *Held*, that the rates are valid. *Port Richmond & Bergen Point Ferry Co.* v. *Board of Chosen Freeholders*, 77 Atl. 1046 (N. J., Sup. Ct.).

This case differs in its facts from that commented upon in 23 HARV. L. REV. 484 only as involving a New York instead of a New Jersey ferry corporation, its charter permitting a higher charge than that fixed by the freeholders.

INTERSTATE COMMERCE — WHAT CONSTITUTES INTERSTATE COMMERCE — BREAKING OF ORIGINAL PACKAGE BY AGENT FOR DELIVERY. — A corporation sent a box, containing various packages, from a foreign state to the defendant, to deliver the packages to customers whom the defendant had procured. The defendant opened the box and delivered the packages. Certain food commodities were under weight, and the defendant was prosecuted by the state for violating the state pure food laws in delivering them. *Held*, that the defendant was engaged in interstate commerce and so not subject to the state laws. *State* v. *Eckenrode*, 127 N. W. 56 (Ia.).

Courts still make the test of the termination of an interstate shipment whether the original package has been broken, yet they are hedging the rule about with limitations. The doctrine is wholly abrogated as to the taxation of goods shipped from another state. *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500. If the size of the package is reduced below normal for the purpose of evading state regulation the shipment is held not subject to the rule. *Austin* v. *Tennessee*, 179 U. S. 343. See 18 HARV. L. REV. 530. The principal case illustrates another such exception. Where separate packages are combined in a bundle this latter is the original package. *May* v. *New Orleans*, 178 U. S. 496. Yet where such bundle is sent to an agent who breaks and delivers the separate packages to previous purchasers the shipment is held not terminated until actual delivery. The result would be different if the consignee, upon breaking the package, were free to dispose of the individual articles as he chose. The principal case seems sound, as the agent is merely assisting in a continuous shipment to the purchaser. *Rearick* v. *Pennsylvania*, 203 U. S. 507. These arbitrary exceptions to the original-package doctrine show its unsoundness as a hard and fast rule, and that it is becoming merely one of the factors to be considered in determining whether a shipment is terminated.

JOINT WRONGDOERS — CONTRIBUTION. — In a common-law action against the present plaintiff, X had recovered full damage for a collision in which both the plaintiff's vessel and the defendant vessel were at fault. The plaintiff libelled the defendant vessel in a court of admiralty for contribution. *Held*, that it can recover. *The Ira M. Hedges*, 218 U. S. 271.

To the general rule that the doctrine of contribution applies where there is joint liability, there is an exception when the parties are wilful tortfeasors. *Merryweather* v. *Nixan*, 8 T. R. 186. There is no such exception, however, where the party seeking contribution is only technically a wrongdoer and not really blameworthy; for example, a master vicariously liable for the torts actually committed by his servant. Thus, if there are several masters of the one servant and one pays the damages, he can get contribution from the others. *Wooley* v. *Batte*, 2 C. & P. 417. A relation of master and servant exists between those who operate a vessel and its owner or charterer, and the same reasoning applies to the liability of the ship itself. The principal case might also be supported on the well-established admiralty rule for division of loss when both ships are at fault, regarding the damages paid to X as a part of the loss. See *Nashua, etc. Co.* v. *Railroad*, 62 N. H. 159.

LEGACIES AND DEVISES — PAYMENT — INTEREST BY WAY OF MAINTENANCE. — A father bequeathed £15,000 to each of his sons living at his death who should attain the age of twenty-five, and a further similar legacy on their reaching thirty. *Held*, that the legacies do not bear interest. *In re Abrahams*, 55 Sol. J. 46 (Eng., Ch. Div., Nov. 3, 1910).

Contingent legacies and legacies vested but payable at a future date carry no interest until payable. *Heath* v. *Perry*, 3 Atk. 101. An exception arises on bequests of this kind to an infant child; for the court "will not presume the father . . . so unnatural as to leave a child destitute" meanwhile, and accordingly will allow interest as maintenance from the testator's decease. *Incledon* v. *Northcote*, 3 Atk. 430. This, however, is a matter of presumed intention and not a vested right. *In re George*, 5 Ch. D. 837. See *In re Bowlby*, [1904] 2 Ch. 685, 706. Thus it is defeated by a separate provision for maintenance. *Wynch* v. *Wynch*, 1 Cox Ch. 433. But no case is found where a legacy from parent to child, unaccompanied by distinct maintenance, which is to vest or be paid after the legatee reaches twenty-one or marries, has been held to carry interest; and the Chancery Division have wisely refused to shelter such within the exception. An intermediate provision for maintenance is fairly to be implied where fatherly solicitude postpones the fund only until the age of majority and of discretion; but no such implication arises in gifts to men at thirty.

MALICIOUS PROSECUTION — BASIS OF ACTION — MALICIOUS PROCURING OF INJUNCTION. — The defendant maliciously and without probable cause procured an order restraining the plaintiff from selling certain property, as a result of which the plaintiff lost the sale. The plaintiff brought an action for malicious prosecution. *Held*, that he can recover. *Kryszke* v. *Kamin*, 128 N. W. 190 (Mich.).

Although the statute of Marlbridge, which gave full costs against a plaintiff *pro falso clamore*, restricted in large measure the ancient common-law right of action for the malicious prosecution of any civil suit, yet an action could always be maintained when a civil proceeding was maliciously prosecuted and caused some special damage to person or property, beyond the ordinary costs of defense. *Goslin* v. *Wilcock*, 2 Wils. K. B. 302; *Redway* v. *McAndrew*, L. R. 9 Q. B. 74. See *Savill* v. *Roberts*, 12 Mod. 208. Hence the decision in the principal case marks no departure from well settled principles. *Mitchell* v. *Southwestern R. R.*, 75 Ga. 398; *Newark Coal Co.* v. *Upson*, 40 Oh. St. 17.

A fortiori the action lies in those numerous jurisdictions of this country where, in accordance with the so-called American rule, an action lies for the malicious prosecution of a civil suit, where no special damage ensues. *Closson* v. *Staples*, 42 Vt. 209. That this old common-law right of action is distinct from the remedy on the injunction bond, is clear both on principle and authority. The former arises *ex delicto*, whereas the latter is dependent solely upon the terms of the contract and the amount of recovery is limited thereby. *Anderson* v. *Provident Life & Trust Co.*, 26 Wash. 192; *Lawton* v. *Green*, 64 N. Y. 326. *Contra*, *Gorton* v. *Brown*, 27 Ill. 489. But see *Crate* v. *Kohlsaat*, 44 Ill. App. 460.

MANDAMUS — ACTS SUBJECT TO MANDAMUS — ELECTION OF OFFICER AT WILL, WHEN OFFICE IS OCCUPIED. — A board of justices had the duty of electing a clerk, removable at its pleasure. Certain ineligible justices voted, converting what would otherwise have been a tie between A and B into a plurality for A, and A entered upon the office. B applied for a writ of *quo warranto* against A and *mandamus* against the justices, requiring them to elect a clerk. *Held*, (1) that the writ of *quo warranto* should not issue; (2) that the writ of *mandamus* should issue. *The King* (*Roycroft*) v. *Justices of Schull, etc.*, [1910] 2 Ir. 601. See NOTES, p. 313.

MECHANICS' LIENS — EFFECT OF STOP NOTICE WHEN CONTRACTOR SUBSEQUENTLY DEFAULTS. — The plaintiff, a subcontractor, served a stop notice on the defendant, the owner, at a time when the instalments due from the defendant to the original contractor were greater than the amount of the plaintiff's claim. The contractor subsequently defaulted, and the defendant completed the building under a provision in the contract. The cost of doing so, with the instalments paid to the contractor before service of the stop notice, if deducted from the contract price, left a balance smaller than the plaintiff's claim. *Held*, that the plaintiff can recover the full amount of his claim. *Stone Post Co.* v. *Corcoran*, 77 Atl. 1031 (N. J., Sup. Ct.).

Mechanics' liens on realty may be divided into two classes: those attaching directly, irrespective of the contract between the owner and builder, and those where the subcontractor is subrogated to the contractor's claim. See *Hunter* v. *Truckee Lodge*, 14 Nev. 24. In case of the contractor's default a lien of the second type attaches only to the extent of the difference between the cost of completion to the owner and the amount of the price unpaid. *Van Clief* v. *Van Vechten*, 130 N. Y. 571; *Campbell* v. *Coon*, 149 N. Y. 556. The New Jersey statute is of the second type. N. J. LAWS OF 1898, c. 226. It contains, however, a provision giving the subcontractor the supplementary remedy of a lien on the amount due or to become due from the owner to the contractor. *Fell* v. *McManus*, 1 Atl. 747 (N. J.). *Cf. Culver* v. *Fleming*, 61 Ill. 498. This lien may exist where that on the realty could not. *Bates* v. *Santa Barbara County*, 90 Cal. 543. The principal case, though putting the subcontractor in a better position than the contractor under whom he claims, is in line with previous New Jersey decisions in making the time of serving the notice the test of the subcontractor's right. See *Reeve* v. *Elmendorf*, 38 N. J. L. 125; *Anderson* v. *Huff*, 49 N. J. Eq. 349. It is not unsupported by authority elsewhere. *Russ Lumber & Mill Co.* v. *Roggenkamp*, 35 Pac. 643 (Cal.). But see *Jorda* v. *Gobet*, 5 La. Ann. 431. And it seems just that the right, once accrued, should not be defeated by the contractor's default.

POLICE POWER — REGULATION OF BUSINESS AND OCCUPATION — COMPULSORY INCORPORATION OF BANKS. — A statute of Nevada made unlawful the transaction of a banking business except by means of a corporation. Banking corporations were subject to regulation. By another statute, at least three persons had to associate to form a banking corporation. *Held*, that the statute

requiring incorporation is unconstitutional. *Marymont* v. *Nevada State Banking Board*, 111 Pac. 295 (Nev.).

For a discussion of the principles involved in this case, see 23 HARV. L. REV. 629.

RECEIVERS — LIABILITY OF FOREIGN RECEIVER OF INSOLVENT CORPORATION FOR FRANCHISE TAX. — An insolvent company, incorporated in New Jersey but having its sole office and all its assets in Massachusetts, was in the hands of a receiver appointed by the federal court in Massachusetts, which had permitted him to carry out a beneficial contract. A heavy franchise tax, constituting a prior claim in case of insolvency, was then imposed by the law of New Jersey. *Held*, that the court will not direct the receiver to pay the tax. *Franklin Trust Co.* v. *State of New Jersey*, 181 Fed. 769 (C. C. A., First Circ.).

Penal and revenue laws are of no extraterritorial validity. See *Ballou* v. *Flour Milling Co.*, 67 N. J. Eq. 188; 22 HARV. L. REV. 292. New Jersey, therefore, had no legal claim to be enforced in this proceeding (which, it should be noted, is governed by the general rules of equity and does not come under the Bankruptcy Act). The tax claim must therefore fail unless equitable considerations induce the court, in the exercise of its discretion, to order the receiver to satisfy the demand. But the arbitrary character of this tax does not commend it to equity; indeed a New Jersey court has itself forecasted the present decision. See *Ballou* v. *Flour Milling Co.*, *supra*, 191. In the principal case a dissent proceeds upon the ground that fundamental equitable precepts urge payment here as a return for the privilege of exercising the franchise. The assets, however, were not thereby swelled; and cancellation of the franchise would not have prevented the carrying out of the beneficial contract. See *Lothrop* v. *Stedman*, Fed. Cas. No. 8,519. Thus the refusal of the majority to postpone *bonâ fide* Massachusetts creditors to the state of New Jersey's claim appears to recognize the real equity of the situation.

RESCISSION — RESCISSION FOR FRAUD OR MISTAKE — REPRESENTATIONS MADE THROUGH MERCANTILE AGENCY. — In 1903 the plaintiff bought $5000 worth of stock in the X Co., relying on a report of its financial condition made to Dun & Co., a mercantile agency, by its president, who knew the report was materially false. The plaintiff was not a subscriber of Dun & Co.'s, but obtained the report through a member of a firm which was a subscriber. In 1906 the plaintiff learned the true condition of the X Co.'s finances, offered to return the stock, and demanded the return of his money. Later in that year the company was adjudged a bankrupt. *Held*, that the plaintiff is entitled to prove for $5000 with interest from date of rescission. *Davis* v. *Louisville Trust Co.*, 181 Fed. 10 (C. C. A., Sixth Circ.).

It is established law that a defrauded buyer, after a "rescission *in pais*," may require a restoration of that which he has paid the seller. 1 BIGELOW, FRAUD, 75. Usually one who makes a representation owes no duty, except to the person to whom he is communicating it, to tell the truth. *Western Union Tel. Co.* v. *Schriver*, 141 Fed. 538. However, where reports are filed for the purpose of being consulted by the public, they are representations to any one who may consult them. *Warfield* v. *Clark*, 118 Ia. 69. This is at least partially true when a report is filed with a mercantile agency. *Tindle* v. *Birkett*, 171 N. Y. 520; *National Bank of Merrill* v. *Ill. & Wis. Lumber Co.*, 101 Wis. 247. See 15 HARV. L. REV. 158. Hence in the principal case there would have been no doubt on the authorities had the report been secured directly from the mercantile agency. And the case seems clearly right on principle and authority in holding that no different rule applies because the plaintiff was not a subscriber to the mercantile agency, but got the representation indirectly. See *Genesee County Savings Bank* v. *Mich. Barge Co.*, 52 Mich. 164; *Emerson* v. *Detroit Steel & Spring Co.*, 100 Mich. 127; *Bedford* v. *Bagshaw*, 4 H. & N. 538, 548; *Scott* v. *Dixon*, 29 L. J. Exch. 62.

SALES — TIME OF PASSING OF TITLE — CASH SALES: WAIVER OF THE CONDITION BY DELIVERY. — A, intending a cash sale, delivered to B a warehouse receipt representing the goods, and accepted in exchange a check, which was subsequently dishonored. B transferred the warehouse receipt to C, a *bonâ fide* purchaser. *Held*, that C acquired an indefeasible title. *Ammon* v. *Gamble-Robinson Commission Co.*, 127 N. W. 448 (Minn.).

A agreed to sell B for cash two guns, which he delivered to B in return for a check, which was later dishonored. B sold the guns immediately to C, who had no notice. *Held*, that C acquired no title. *Johnson* v. *Iankovetz*, 110 Pac. 398 (Or.).

For a discussion of the principles involved, see 23 HARV. L. REV. 69.

SURETYSHIP — SURETY'S DEFENSES: ABSENCE, EXTINCTION, OR SUSPENSION OF THE PRINCIPAL OBLIGATION — ESTOPPEL. — In exchange for a renewal note on which the defendant's name, as surety, was forged, the plaintiff, the payee, marked "paid" and returned to the maker a note, signed by the defendant as surety. The maker told the defendant that the note was paid, and had been returned to him. After the original note had matured, the maker became insolvent. The plaintiff then sued the defendant as surety on the original note. *Held*, that he cannot recover. *Reints & De Buhr* v. *Uhlenhopp*, 128 N. W. 400 (Ia.).

The acceptance of a renewal note, which is unenforceable because of forgery, does not discharge the surety on the original obligation. See 17 HARV. L. REV. 205. But this case, relying upon a doctrine of estoppel laid down in an earlier Iowa case, holds that if in reliance upon the surrender of the original note the surety is lulled into security and does not take steps to protect himself, and thereby is actually prejudiced, the creditor is estopped thereafter to proceed against him. *Kirby* v. *Landis*, 54 Ia. 150. The fallacy in this argument is that the creditor has made no misrepresentation, no unequivocal statement, upon which the surety is justified in relying. When the creditor surrendered the original note, in effect all that he said was that he thought he had been paid, but that if the renewal note was not good, he would hold all parties to the original obligation. Any stronger statement than that by the principal to the surety is unauthorized by the creditor. And a mere statement by the principal that the note is paid cannot be relied upon by the surety. *Town of Sullivan* v. *Cluggage*, 21 Ind. App. 667.

TAXATION — WHERE PROPERTY MAY BE TAXED — TAXATION BY STATE OF DOMICILE OF GIFTS MADE ABROAD. — A, domiciled in Wisconsin, went into Illinois and there conveyed to an Illinois trust company certain personal property, in trust for himself for life, and then for his sons. The property was then and at all times in Illinois. A Wisconsin statute taxed all transfers of property by a resident made "in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at, or after, such death." *Held*, the property was subject to the tax. *In re Buller's Estate*, 128 N. W. 109 (Wis.). See NOTES, p. 307.

VESTED, CONTINGENT, AND FUTURE INTERESTS — COVENANT TO PAY LIFE ANNUITY — APPORTIONMENT BETWEEN CAPITAL AND INCOME. — A testator who had covenanted to pay an annuity bequeathed the proceeds of the sale of his residuary estate upon successive trusts for certain life tenants and remaindermen. *Held*, that the successive instalments of the annuity must be borne by income and capital as follows: calculate what sum, if set aside at the testator's death, would with simple interest at three and one-half per cent to the day of payment have met the particular instalment; charge that sum to capital and the balance to income. *In re Poyser*, [1910] 2 Ch. 444. See NOTES, p. 309.

WATERS AND WATERCOURSES — APPROPRIATION — BENEFICIAL USE. — The complainant improved both sides of a stream as a summer resort, the chief attractions of which were the vegetation and foliage. These owed their existence solely to the water from the stream. By a provision of the state constitution, appropriations to beneficial uses are protected. *Held*, that the complainant has made an appropriation to a "beneficial use." *Cascade Town Co.* v. *Empire Water & Power Co.*, 181 Fed. 1011 (Circ. Ct., D. Colo.).

The doctrine of prior appropriation arose through the sanction given by courts and legislatures to miners' customs, which were adopted from the necessity for an assured proprietorship of water, and the consequent inapplicability to an arid region of the common-law rule governing riparian rights. *Jennison* v. *Kirk*, 98 U. S. 453; *Reno S. Works* v. *Stevenson*, 20 Nev. 269. See POMEROY, LAW OF WATER RIGHTS, § 15. With the increasing needs of the community, the purposes to which water might be appropriated became more numerous. *Hammond* v. *Rose*, 11 Colo. 524 (irrigation); *McDonald & Blackburn* v. *Bear River, etc. Co.*, 13 Cal. 220 (milling). But a diversion with no intent to put the water to some immediate use was never recognized as a valid appropriation, for the same reasons that gave rise to the doctrine. *Combs* v. *Agricultural Ditch Co.*, 17 Colo. 146 (speculation). Aside from such instances, situations calling for the enunciation of some general principle to determine with more exactness the meaning of "beneficial uses" have rarely presented themselves to the courts. The decision of the principal case points to the conclusion that the proper test is the reasonableness of the use, with reference to all the surrounding circumstances, thus following the analogy of the common-law principles governing riparian rights. *Lawrie* v. *Silsby*, 82 Vt. 505; *Elliot* v. *Fitchburg R. Co.*, 64 Mass. 191.

WILLS — UNDUE INFLUENCE — BURDEN OF PROOF. — The will of the testatrix gave practically all of her property to her brother, who was her business adviser. A son, for whom the testatrix said she would provide, received $10. The testatrix executed the will on her deathbed and was so sick that she could neither read nor write. A few days before the execution of the will, the testatrix gave all of her cash on hand to her brother. *Held*, that the proponent has the burden of rebutting the presumption of undue influence. *In re Everett's Will*, 68 S. E. 924 (N. C.).

Two weeks after making his first will, the testator executed a second, leaving all of his property to his attorney. The attorney's partner drew the will. The attorney made a declaration of trust in favor of some of the legatees of the first will. *Held*, that the burden of proving undue influence is on the contestant. *Mordecai* v. *Canty*, 68 S. E. 1049 (S. C.).

The existence of a confidential relation between the parties to a gift or contract *inter vivos* raises a presumption of undue influence. *Archer* v. *Hudson*, 7 Beav. 551; *Burnham* v. *Heselton*, 82 Me. 495. The natural influence of a fiduciary exerted to obtain a benefit for himself is regarded by equity as undue. See *Parfitt* v. *Lawless*, L. R. 2 P. & D. 462. As to wills, influence to be undue must amount to coercion, such as to destroy the testator's free agency. *Hall* v. *Hall*, L. R. 1 P. & D. 481; *Wingrove* v. *Wingrove*, 11 P. D. 81. That no presumption of undue influence exists in the case of wills is the rule of the majority of courts. *Micheal* v. *Marshall*, 201 Ill. 70; *Baldwin* v. *Parker*, 99 Mass. 79. *Contra*, *Morris* v. *Stokes*, 21 Ga. 552, 575. The distinction is that whereas it is unlikely that one should strip himself of property during his lifetime, it is most natural that a testator should make his will in favor of those with whom he is in confidential relation. *In re Sparks*, 63 N. J. Eq. 242. The strong facts of the North Carolina case may make the actual decision correct. A similar previous case in the same state proceeds on grounds in accord with the weight of authority. *Downey* v. *Murphey*, 1 Dev. & B. 82 (N. C.). In any event, a presumption does not shift the burden of proof, but merely the burden of going forward with the evidence. THAYER, PREL. TREAT. EVID. 380–384, 575.

BOOK REVIEWS.

THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY. An Historical Essay on the Boundaries Between English Legislation and Adjudication in England. By Charles Howard McIlwain. New Haven: Yale University Press. 1910. pp. xiv, 408.

It is a great mistake to say that learning makes no progress. This work is a study of that side of the English Parliament which is and always has been the highest court in the kingdom; and incidentally of the later growth of Parliament as a law-making body, its legislative side increasing as its judicial side disappeared. On several luminous thoughts, such as the modernity of the sharp distinction between legislative and judicial, between law making and law declaring, little known or considered in early England; on the importance of using words, not as we know them, with their modern connotations, but as known to our ancestors, thus not distorting ancient institutions into modern ones; Professor McIlwain has based a study which, wholly in the line of modern thought, is yet far away from the position of Blackstone or even later commentators, and, I think, no less accurate for being more profound. In his preface the writer notes the absence of law *making* in early England, even after the Conquest, "the law was declared rather than made. . . . Was a body of custom which in time grew to be looked upon as a law fundamental." And much of the book is given to showing how ancient is the principle that statutes inconsistent with this fundamental law might be void; so declared, if not always by an ordinary court, at least by the high court of Parliament, and not necessarily that Parliament which enacted the rule in question. In these earliest times there was absolutely no distinction, or even understanding, of the differences between governmental activity, as legislative, judicial, or administrative. Parliament participated in all these functions. The law resides in the people, and the judges speak the law; thus it is the law of a *court*, the law expressed by the suitors, in the court behind a great man's castle (hence the name of court — *curia*) is the law of the people legitimately expressed, "judge-made" in the oldest times; and Acts of Parliament were merely the similar judgments of another, if higher, court. The writer is careful to state that he does not mean to follow his investigations into America; but does not refrain at the proper point from a luminous suggestion, as that — "It may well be doubted whether the doctrine of parliamentary sovereignty in any form that means much can long survive the triumph of democracy" (p. xv). The House of Lords itself is at the moment demanding a *referendum* in England. Furthermore, the adoption of the *referendum* and of authoritative instructions will not only do away with sovereign parliament but with party lines, — with the old two-party system. So may we hope at last to follow Washington's warning against parties — "The common and continual mischiefs of the spirit of party are sufficient to make it the interest and duty of a wise people to discourage and restrain it" (p. xvii).

It is a vexatious habit of reviewers to seem to add learning of their own, or at least to differ, albeit in minor particulars, from the learning set before them; but the reader primarily wishes to know what is in the book, not other people's differences, however excellent. Professor McIlwain's book is devoted to five chapters; an introduction wherein he treats of written constitutions, of judicial review of legislation, the transfer of this notion to America, the source of law making in early England — upon which he takes what we may call the English rather than the Roman or Norman view — the growth and nature of the Great Council, the nature also of *Magna Carta* which "is first of all a feudal document and not a national one" (p. 14), the growth of the King's courts, the differences

between them and the Council, the meaning of the word "Parliament" and of the thing itself and the superseding of its jurisdiction by that of the House of Lords. The second chapter is upon "The Fundamental Law"; the third and longest, "Parliament as a Court"; the fourth upon "The Relations of 'Judiciary' and 'Legislature'"; and the fifth is entitled "The Political History of Parliamentary Supremacy."

Like most writers to-day Professor McIlwain finds the common law a people's law, not the order of a sovereign, even of a sovereign Parliament. "The common law was thus in the main the product of a court, not of a legislature" (p. 44). Inquests may declare the customs of the realm, assizes adjudge them, but it is a long time before the assize becomes a statute or is recognized as such. The charters of the Norman kings profess always to secure rights already existing; the assizes relate to matters of procedure. "Such customary laws as these, declared by inquest or by Council, hardly ever ostensibly altered, with no assignable beginning, must almost of necessity in process of time acquire a character of inviolability." . . . "In this process of development, the idea of the traditional law is never lost. At first it may be the privileges of the few that are treasured as inalienable and fundamental, but even these 'liberties,' though they may at first be actually licenses to oppress the mass of the people, are in a future time to prove the greatest inheritance of the nation. For these liberties are rights, and rights imply an immunity from arbitrary authority of which the nation may avail itself when it has come into being. They carry with them the idea of government under law instead of limitless discretion" (pp. 52–53). The author wisely notes that one of the confirmations of the Charters, that of 1368, is in these words: "It was 'assented and accorded, That the Great Charter and the Charter of the Forest be holden and kept in all points; and if any Statute be made to the contrary, that shall be holden for none'" (p. 59). It is only recently that the learning of American constitutional lawyers has progressed beyond Gladstone's trite, shallow, and misleading *dictum*. Many later instances are given, many examples of a fundamental law recognized not only in the decisions of high courts of the Parliament but in statutes as well. Even in Bracton's time there was a body of law that the king could not alter, and it is only since the radical thought of the Revolution that the same may not be said of Parliament. In vain could Richard II say his "laws were in his mouth"; in vain James I say, "although we have never studied the common law of England, yet are we not ignorant of any points which belong to a king to know" (p. 80). And again to his Parliament in 1607, "Let your Lawes be looked into for I desire not the abolishing of the Lawes, but onley the clearing and sweeping off the rust of them" (p. 74). "Where the statutes have not altered the positive law," says Noy, "but have only increased or decreased the punishment thereof, they have done great good, but where they have altered the common law in substance, they have done great harm" (p. 74). The common law remained the victor. "The clause in the Act of Settlement which changes the tenure of judges (to a life tenure) is justly regarded as one of the most important parts of the Revolution settlement. When the settlement of questions involving almost the very existence of the state depended upon the bare decision of the King's judges, and their own tenure of office upon the favor of the King, it is not strange that the oracles were sometimes suspected. . . . When the King could descend to personal encounter with one of them, 'looking and speaking fiercely with bended fist, offering to strike him,' because that judge 'humbly prayed the King to have respect to the Common Lawes of his land,' it is little wonder that even the inflexible Coke should fall 'flatt on all fower' and humbly beg the King's pardon and compassion."

Perhaps the most novel, hence to the ordinary reader the most profound of these essays is that upon Parliament as a Court, to which the reader can only be referred as the best present monograph on this little understood subject. It covers 148 pages, being, indeed, the greater part of the book.

The fourth chapter on "The Relations of 'Judiciary' and 'Legislature,'" is closely connected with it. "The idea that law can be made is also very modern" (p. 300). Parliament, therefore, was far more a court than a legislature; this is the fundamental thought; and the antithesis between the English and the American Constitutions is more lucidly explained than in most books. The predominance is pointed out, in America, of the old notion that there was a constitution, a fundamental law above the legislatures protecting the people, shown in many subjects and writings before the Revolution, notably the words of James Otis — "An act against the constitution is void" in his arguments against writs of assistance; "and there it was destined [the older theory] to continue and influence the course of government and the decisions of courts for generations; but in England the life had gone out of the theory, and parliamentary omnipotence occupied the whole field" (pp. 309–310). There is some very fresh and needed writing on the neglected subject of the constitutional basis of the doctrine against the delegation of the legislative power, of the reasons why continental countries adopt administrative law, and England and ourselves, until very recently, rejected it. "The outcry over the 'forty days' tyranny' in 1776, when Chatham by an Order in Council laid an embargo on grain, showed the feeling of Parliament on such matters. The present agitation in the United States over 'Government by Commission' is due in part to a similar feeling." The separation of the powers is also discussed; one of the principles which Continental countries have taken over, from Montesquieu, and so completely that in them the courts may not judge between the constitution and the law; and there is a valuable note upon the delegation of power by Parliament (p. 318) — "The feeling in the United States against 'Government by Commission' extends not merely to commissioners appointed without statutory warrant, but also to those based upon an act of Congress. This involves the constitutional question as to the ability of Congress to delegate its legislative power, a subject recently much discussed. In the Parliaments of the Norman period this question could hardly arise. Even so late as the reign of Edward I, we have found the Council making laws after the rest of the Parliament had gone home."

The last chapter on "The Political History of Parliamentary Supremacy," lasting at most from the Revolution to the present Parliament, and of an actual sovereignty, lasting from Hobbs to Austin — not quite so long — is mainly historical; reaching over to America and showing how for once a lack of political theory, a poverty of new political ideas prevented Englishmen from grasping the idea with sufficient rapidity that a charter of a trading company was not an adequate bridle for an English commonwealth beyond the seas. "All this furnished a remarkable parallel to the break-down of the Roman constitution under the Republic, caused by the fiction that the local laws of a city could be spread thin enough to do duty as a constitution for the greater part of the civilized world" (p. 365).

So we may close this review of a most interesting book with one of its luminous apperceptions, "There is no gift more rare than the power to interpret contemporary events, except, possibly, the ability to understand past ones."

F. J. S.

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ADMINISTRATIVE EXERCISE OF THE POLICE POWER.

[*Continued.*]

II.

ADMINISTRATIVE ORDERS AND EXECUTION.

PRECAUTIONARY regulation cannot always afford adequate protection to public health and safety. Many acts must be prohibited altogether, irrespective of the personal qualifications of those who would undertake them; and the denial of permission to proceed obviously cannot guard against the perils which arise from natural conditions and human neglect. The exercise of the police power will therefore often take the form of absolute prohibition and of specific commands to take positive remedial action, or even of such action by governmental authorities.

Here, as in precautionary regulation, the importance of expert judgment and of flexibility in the law induces the legislature to vest wide powers in administrative bodies. The discretion so vested may consist in the power to issue general regulations, supplementing the statute, and relating to designated acts or conditions wherever committed or existing within the area over which the administrative authority has jurisdiction. These general regulations may be unlimited as to time,[1] or promulgated only for some temporary emergency.[2] In other instances the statute may itself condemn certain physical conditions, and vest in some administrative body

[1] State *v.* Speyer, *infra*, p. 344.
[2] Jew Ho *v.* Williamson, *infra*, p. 341.

the power to direct the alterations to be made by specific orders in each individual case;[3] or the board may be authorized to select the particular property, acts, or practices assumed to be hazardous, and direct such discontinuance or modification as it may judge necessary.[4] Finally, the administration may be empowered to take action itself, forcibly interfering with person or property to apply the necessary remedy.[5]

A. *Necessity for Notice and Hearing.*

(1) *General Regulations.* — Where the persons affected by any regulation or order cannot be definitely known, the requirement that they must have notice and an opportunity to be heard before its issue would obviously defeat the exercise of the power vested. Accordingly the granting of such opportunity is not deemed a prerequisite to the issue of regulations general in scope. In Belcher *v.* Farrar [6] it was held that the order of the board of health prohibiting the manufacture of kerosene within the town limits was not invalidated by the fact that it was passed without first giving notice to those engaged in carrying on the trade.

(2) *Special Orders.* — Often the order of the board will relate only to a named individual. The legislature may itself designate the objects or acts which it deems dangerous, and leave to the administrative body only the power to specify the remedial action to be taken in each particular case. Here there is no inherent reason why the individual concerned may not be given an opportunity to be heard. But here also such opportunity is not deemed essential to due process.

The statute under consideration in Health Department *v.* Rector of Trinity Church [7] required that all houses of a certain description should "upon direction of the board of health" be supplied with water "in sufficient quantity" at one or more places on each floor occupied by a family. The owner objected that the order of the board was made without notice to him. But the court replied that the changes might have been ordered specifically by the legislature

[3] Health Department *v.* Trinity Church, *infra*.
[4] Board of Health *v.* Copcutt, *infra*, p. 335.
[5] North American Cold Storage Co. *v.* Chicago, *infra*, p. 336.
[6] 8 Allen (Mass.) 325 (1864).
[7] 145 N. Y. 32 (1895).

without giving notice to persons to be affected thereby, and asserted that the fact that the legislature had chosen to delegate a certain portion of its powers to the board of health did not alter the principle.

The order in this case, though relating to an individual piece of property, was not in the nature of an adjudication, requiring the ascertainment of facts from conflicting evidence, but was merely the declaration of the will of the governing authority, — the making of a special regulation to fill in the details of the statute, which by reason of the flexibility of its requirements may be regarded merely as an amalgam of separate statutes passed in respect to each member of the class to which its general provisions relate. The legislature might have passed a special enactment for each tenement house in the state; so that the court was clearly justified in applying the same principle adopted with respect to regulations more general in scope.

(3) *Adjudications.* — The administrative action to which a property owner objects may consist in a determination or adjudication that dangerous or unsanitary conditions exist, as well as a declaration of the remedial action deemed necessary. Where the property admittedly falls within the ban of some administrative prohibition because of certain characteristics inhering in all property of the same general nature or devoted to the same general purposes, we have merely an exercise of the general ordinance power already considered. But when the owner denies that his estate is within the iniquitous class, and the administrative order involves a determination of the dispute, or where it is based on conditions peculiar to the individual parcel, we have action commonly deemed to be of a judicial nature, where notice and an opportunity to be heard is supposed to be essential. But even here, the doctrine prevails that such notice and hearing may be dispensed with.

In an action for penalties for violating the orders of a board of health relative to the destruction of a certain dam and a bill to enjoin further violation,[8] it was held that the defendant had no ground of complaint merely because the order which decreed the destruction of his particular piece of property was passed without notice and an opportunity to be heard. The same court refused to review the proceedings of the board by *certiorari*, on the ground that it

[8] Board of Health *v.* Copcutt, 140 N. Y. 12 (1893).

had the right to act "upon its own inspection and knowledge of the alleged nuisance," and could obtain its information "from any source and in any way." [9]

But in all these instances, the issue of some regulation or special order is in itself merely a threatened, not an actual, invasion of property right. Where it is not to be enforced without first giving the owner an opportunity to comply with its demands, he may reach the ear of some chancellor and urge other reasons for enjoining the enforcement of the administrative order, than that it was issued without granting him prior audience.[10]

(4) *Summary Execution.* — Meanwhile, however, the danger which the administration sought to avert may already have accrued. In the removal or destruction of conditions dangerous to public health and safety, prompt action is often of the utmost necessity. The administration is therefore often authorized to remove or destroy property without even notifying the owner that any action is contemplated. Such summary execution is not improper merely because the owner had no prior opportunity to take action himself or to dissuade the board from acting.[11]

In dismissing a bill seeking to enjoin health officials from destroying certain poultry in cold storage without first giving the owner an opportunity to be heard as to its condition, the Supreme Court refers to the difficulty of guarding against the peril from unwholesome conditions while the hearing is in progress, and holds that in matters relating to the destruction of food not fit for human use, the question whether the danger to the public health is such as to require the denial of this preliminary hearing is one for the reasonable discretion of the legislature.[12] They held that this boundary had not been transgressed, in spite of the complainant's plea that the denial of a hearing is unnecessary as to the condition of food in cold storage, which can do no harm until it is removed.

The owner complained also that he was not permitted to carry on his ordinary business until he delivered the poultry claimed to be diseased. The point was waived in order to secure a decision simply

[9] People *ex rel.* Copcutt *v.* Board of Health, 140 N. Y. 1 (1893).

[10] See *infra*, "Judicial Review."

[11] This power vested in administrative authorities is no greater than that exercised by individuals. A private individual may abate summarily a public nuisance by which he is specially aggrieved. See cases cited in Fields *v.* Stokely, 99 Pa. St. 306 (1882).

[12] North American Cold Storage Co. *v.* Chicago, 211 U. S. 306 (1908).

as to the omission of a hearing; but the court observed that such action would seem to have been arbitrary and wholly unnecessary. It would seem, however, that if authorized by the statute, it should be sustained. When the owner refuses to separate the bad from the good, adequate protection requires that he be prevented from distributing any of the products so intermingled.

Thus it is established that the granting of an opportunity to be heard is not a prerequisite of the validity of administrative action in the exercise of the police power, whether it take the form of the issue of a general or special regulation, a determination that certain property constitutes a nuisance, or forcible destruction or removal.

This power of summary administrative action without notice and an opportunity to be heard is sustained also with respect to the forcible removal to a pest-house of a person infected with a contagious disease,[13] and it seems, also, a person having the appearance or symptoms of a contagious disease;[14] the confinement to his home and quarantining of a person reasonably but erroneously believed to be infected with a contagious disease;[15] the seizure of samples of milk for purposes of analysis;[16] the destruction of that found below standard,[17] and similar destruction of commercial fertilizers which, though innocuous, are equally impotent to do good, and therefore valueless for commercial purposes;[18] the seizure of intoxicating liquor kept and intended for unlawful use,[19] and of property deemed unsuitable for any righteous purpose, such as gambling instruments;[20] and the removal and incidental destruction of articles which, though capable of lawful use, are actually employed for

[13] Haverty *v.* Bass, 66 Me. 71 (1876).

[14] Brown *v.* Purdy, 8 N. Y. St. Reporter 143 (1886), (*semble*).

[15] Beeks *v.* Dickinson County *et al.*, 131 Ia. 244 (1906); Valentine *v.* Englewood, 76 N. J. L. 509 (1908).

[16] Commonwealth *v.* Carter, 132 Mass. 12 (1882).

[17] Deems *v.* Baltimore, 80 Md. 164 (1894).

[18] Patapsco Guano Co. *v.* Board of Agriculture, 171 U. S. 345 (1898). *Cf.* Buttfield *v.* Stranahan, 192 U. S. 470 (1904), for similar action by federal authorities under the power to exclude imports from foreign countries.

[19] State *v.* O'Neil, 58 Vt. 140, 161 (1885).

[20] J. B. Mullen & Co. *v.* Mosley, 13 Idaho 457 (1907), Police Commissioners *v.* Wagner, 93 Md. 182 (1901), and cases cited in the opinion. *Contra*, Lowry *v.* Rainwater, 70 Mo. 152 (1879): "The vices which acts authorizing these summary proceedings propose to eradicate are inconsiderable in comparison with the value of the constitutional guarantees which secure to the citizen his liberty and his property."

illegal purposes in such a manner that their forcible removal is the only method of terminating promptly a continuing and persisting violation of the law, effected without the aid of renewed or repeated activity of any human agency.[21]

In the Supreme Court the power of summary removal of articles so violating the law is confined to those of trifling value.[22] This limitation prevents the exercise of summary administrative action to secure the seizure and sale of teams employed unlawfully in cutting timber on public lands,[23] and of boats or vessels used by one person in interfering with oysters or other shell-fish belonging to another.[24] It is held that judicial proceedings are always necessary where the sale and not the destruction of property is to be effected. The courts sanction the summary removal of wooden roofs and buildings constructed in defiance of the building laws; [25] but reasonable care must be taken to preserve the materials for the owner.[26] In the cases relating to buildings, notice to the owner preceded the abatement by the administration; but in the Indiana decision it was declared that buildings erected in violation of the building laws are public nuisances, and that public nuisances may be abated without notice.

B. *Judicial Review.*

Though administrative action is not deemed improper merely on the ground that notice and an opportunity to be heard are absolutely essential, the validity of orders issued or of action taken may be questioned in judicial proceedings of various kinds.

Where the officers have already accomplished their object by direct physical invasion of property, judicial redress is necessarily limited to a suit for damages. If, however, the administrative action consists only in a threatened invasion or in an order to the owner to take action himself, the courts are open to receive his motion for a bill of injunction. If under the statute the administration sues for the ex-

[21] Lawton *v.* Steele, 119 N. Y. 226 (1890). *Contra*, Ieck *v.* Anderson, 57 Cal. 251 (1881).

[22] Lawton *v.* Steele, 152 U. S. 133 (1894).

[23] Dunn *v.* Burleigh, 62 Me. 24 (1873).

[24] Colon *v.* Lisk, 153 N. Y. 188 (1897).

[25] King *v.* Davenport, 98 Ill. 305 (1881); Hine *v.* New Haven, 40 Conn. 478 (1873); Baumgarten *v.* Hasty, 100 Ind. 575 (1885).

[26] Eichenlaub *v.* St. Joseph, 113 Mo. 395 (1892).

pense of executing its order after its non-observance by the owner, his defense may question the propriety of the steps taken. And the same privilege obtains where the administration itself calls upon the court for aid in enforcing its decree, or to punish the owner for disobedience.

In all these instances, the possibility of raising the question is manifest. The problem is to discover what respect the courts will pay to the expressed opinion of the administration. How far will they annul or revise the administrative requirements?

The language of some opinions has seemed to indicate that the courts will not question the administrative determination that certain conditions constitute a nuisance.[27] But against any possible contention of such finality or conclusiveness stands the well-nigh

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[27] In Kennedy *v.* Board of Health, 2 Pa. St. 366 (1845), the court excluded evidence as to the cause of a nuisance in an action for the expense of its abatement, and declared: "It is not easy to perceive the relevancy of such evidence, unless it was intended to show by it, that there was in reality no nuisance to be removed. But this latter could not be proved, for the act of Assembly on the subject makes the order of the board conclusive, and expressly enacts that the fact of the nuisance shall not be inquired into. The board decided that the nuisance existed on the lot of the defendant, and the *fact* being so determined, it made no difference from what cause it arose." But in this case the owner did not deny the existence of the nuisance, but tendered his evidence to show that it was caused by others, who should bear the expense of abatement.

In St. Louis *v.* Stern, 3 Mo. App. 48 (1876), a prosecution for failure to abate a nuisance, the court observed: "When the Legislature delegates to certain municipal agents a general power to provide for the preservation of the public health by the removal of nuisances, an adjudication by such agents upon the fact of a nuisance existing within their local jurisdiction is conclusive." But the qualification was added: "At least, in every case, where the subject matter comes within the classifications of *primâ facie* nuisances, and nuisances *per se*."

In Green *v.* The Mayor, 6 Ga. 1 (1849), the court declined to review on *certiorari* the validity of an ordinance prohibiting the growing of rice, saying that the judgment of the Council upon the question of nuisance was "conclusive evidence of that fact." "Legislative bodies judge of the exigency upon which their laws are founded; and when they speak, their judgment is implied in the law itself." The language used is broad enough to forbid judicial review in whatever proceeding the question arises; but from subsequent decisions in the same jurisdiction, it is clear that the doctrine is not applied to proceedings other than those which seek to prevent the administration from executing its determination. Mayor *v.* Mitchell, 79 Ga. 807 (1887); Mayor *v.* Mulligan, 95 Ga. 323 (1893); Western & Atlantic R. R. Co. *v.* Atlanta, 113 Ga. 537 (1901). Moreover, Green *v.* The Mayor is rested on the authority of Martin *v.* Mott, 12 Wheat. (U. S.) 19, which principle, says the court, "applies with greater force to the *law-making power itself*, than to any single officer of the Government." But in Martin *v.* Mott the determination declared conclusive related to the necessity of calling forth the militia, the exercise of a high executive prerogative, with which the courts never interfere.

universal authority.[28] The decisions which overrule the objection that the administrative action was taken without granting an opportunity to be heard insist that this ruling is possible only because the administrative determination cannot be conclusive upon the owner, and that a hearing on the disputed question may later be obtained in judicial proceedings.[29]

But though the courts cling tenaciously to the right to review, they announce repeatedly that respect is due to the opinion of the administration. In Commonwealth *v.* Patch [30] the court declared that in the absence of evidence to the contrary, it would assume that the by-law prohibiting the keeping of swine in particular parts of the city was reasonable. Likewise, in an action to restrain the landing of persons infected with cholera, Judge Cullen declared that the question "is one resting in the discretion of the health officer, as is also the selection of an appropriate site for the landing; and in the absence of an abuse of discretion, his decision in this respect will not be interfered with by the courts." [31]

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[28] In a bill to enjoin the destruction of a dock declared to be a nuisance, Mr. Justice Miller declared: "It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws either of the city or the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities." Yates *v.* Milwaukee, 10 Wall. (U. S.) 497 (1870).

In Hutton *v.* Camden, 39 N. J. L. 122 (1876), the court held that it was error to exclude evidence of the condition of the premises in a suit by the board of health for the expense of abating what they had declared to be a nuisance. "The authority to decide when a nuisance exists, is an authority to find facts, to estimate their force, and to apply rules of law to the case thus made. . . . The finding of a sanitary committee, or of a municipal council, or of any body of a similar kind, can have no effect whatever, for any purpose, upon the ultimate disposition of matters of this kind. . . . The question of nuisance can conclusively be decided, for all legal uses, by the established courts of law or equity alone, and the resolutions of officers, or of boards organized by force of municipal charters, cannot, to any degree, control such decision."

[29] "If the decisions of these boards were final and conclusive, even after a hearing, the citizen would in many cases, hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated and generally unfitted to discharge grave judicial functions. Boards of health under the acts referred to cannot, as to any existing state of facts, by their determination make that a nuisance which is not in fact a nuisance. . . . It is the actual existence of a nuisance which gives them jurisdiction to act." People *v.* Board of Health, 142 N. Y. 1, *supra*. *Cf.* North American Cold Storage Co. *v.* Chicago, 211 U. S. 306, *supra*.

[30] 97 Mass. 221 (1867).

[31] Young *v.* Flower, 22 N. Y. Supp. 332 (1893). But the declaration was qualified by

Where an owner has refused to avail himself of an opportunity to present before the administrative board his objections to their contemplated action, he may find himself subsequently precluded from questioning the reasonableness of the action taken. In Metropolitan Board of Health *v.* Heister [32] suits by the board to recover penalties for the violation of their orders were joined with bills by the owner to restrain their enforcement. The preliminary order to desist from slaughtering was made without notice; but the board directed that it should not be executed until notice served and an opportunity to be heard. The owner declined to present his case before the board; and the court holds, without citation of authority, that "he cannot now complain that their judgment upon the facts is held to be conclusive against him." [33]

Judicial review in the particular instance is obviously unnecessary when the thing prohibited falls within the class of *primâ facie* nuisances or nuisances *per se*,[34] or when the question of the rightfulness of the administrative determination is already *res adjudicata* between the parties.[35]

There are indications that an administrative determination sanctioning an act will receive greater judicial respect than a finding of condemnation.[36] But no such doctrine prevails as a general princi-

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the assertion that the emergency must actually exist, of which the officer is not the sole judge, and that the act done must be fairly and reasonably appropriate for the emergency that has arisen.

In another bill to enjoin the enforcement of a quarantine regulation, where the court found conflicting evidence as to the presence of the bubonic plague, it declared that although it was of the opinion that the plague did not exist in San Francisco, it felt that where there was the slightest doubt, the decision of the board should be sustained. Jew Ho *v.* Williamson, 103 Fed. 10 (1900).

In sustaining an ordinance prohibiting further burial in cemeteries within the city limits, Mr. Justice Holmes observed that the legislation should not be overthrown merely because the opinion of the court as to the reality of the danger from the prohibited act differs from that of those who passed the ordinance. Laurel Hill Cemetery *v.* San Francisco, 216 U. S. 358 (1910).

[32] 37 N. Y. 661 (1868).

[33] The authority of the case is weakened by the fact that the court below, though it found for the owner, had determined as a fact that the business of slaughtering within the city was dangerous to health. The refusal to litigate the question before the board was based on the contention of their want of power over the subject matter.

[34] St. Louis *v.* Stern, *supra*, p. 339.

[35] Wheeler *et al. v.* City of Aberdeen *et al.*, 87 Pac. 1061 (Wash. 1906).

[36] White *v.* Kenney, 157 Mass. 12 (1892). In dismissing a bill to enjoin the erection of a stable for which a license to erect had been granted after a hearing by the board of health, the court excluded evidence as to the probable effect of the erection, saying

ple. In Garrett *v.* State [37] it is held that a board of health has no authority to license the manufacture of fertilizers in such a way as to create what the court deems a public nuisance; and in Pennsylvania R. R. Co. *v.* Angel [38] the company was restrained from conducting what the court declared to be a nuisance, although this use of its property was authorized by the legislature and was necessary to the conduct of its business.[39]

The abatement of a nuisance is often no more of a deprivation to the owner than is its continuance to his neighbors. There seems no good reason why they should be denied the judicial hearing accorded to him. But a license would properly be a bar to a criminal prosecution for conducting the alleged nuisance; and it seems that after express permission, the alleged nuisance can be abated only by judicial proceedings.[40]

Even where the court agrees with the administration that a nuisance exists, they exercise the right to decide whether the abatement ordered or undertaken is proper and necessary.[41] Where a court agreed with the board that a building condemned was unfit for habitation, it declined to sanction the demolition ordered, in the absence of evidence that it could be made fit for habitation, and, even if that were established, unless it should appear that health was endangered by the existence and not merely the use of the building.[42] And it has been held that a jury may on appeal from an order of a board of health prohibiting slaughtering on certain premises, permit the business to be carried on under such restrictions that the premises will be at all times kept neat and clean, where it appears that this can be done.[43]

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that the statute gave the determination of the question to the board of health, and implied that the courts could not restrain any erection authorized by them.

[37] 49 N. J. L. 94 (1886).

[38] 41 N. J. Eq. 316 (1886). This is obviously the proper rule where conditions have altered since the license was granted. Fertilizing Co. *v.* Hyde Park, 97 U. S. 659 (1878). If a city itself maintains what the courts decide to be a nuisance, it may be enjoined, Shreck *v.* Village of Cœur d'Alene, 87 Pac. 1001 (Idaho, 1906); or held responsible in damages, Murray *v.* City of Butte, 35 Mont. 161 (1907).

[39] This position is also discussed at length in Cogswell *v.* New York, etc. R. R. Co., 103 N. Y. 10 (1886).

[40] Everett *v.* Marquette, 53 Mich. 450 (1884).

[41] Weil *v.* Record, 24 N. J. Eq. 169 (1873); Babcock *v.* Buffalo, 56 N. Y. 268 (1874) (injunction issued against filling up a canal, where nuisance could be abated by cleaning it out).

[42] Health Department *v.* Dassori, 81 N. Y. St. Reporter (47 N. Y. Supp.) 641 (1897).

[43] Sawyer *v.* State Board of Health, 125 Mass. 182 (1878).

The same doctrine prevails as to other exercises of the police power than the abatement of nuisances. The existence of conditions to be remedied is not in itself a justification for the action taken or ordered. In Jew Ho *v.* Williamson,[44] where the court conceded the presence of the plague, it examined the provisions of the quarantine regulations, and enjoined them as unreasonable and beyond the necessities of the situation.[45] Similarly in the Trinity Church case,[46] where the statute directed the installation of water service in tenement houses, vesting in the administration discretion to determine the extent of alteration, the court in its discussion laid down the boundaries within which the discretion might be exercised. The amount of expenditure required must be reasonable, and the improvement itself reasonable, considered with reference to the object to be attained, — of which the courts must within the proper limits be the judges.

The opinion says also that no punishment or penalties could be enforced against the defendant without a trial in which he could show that he did not violate the statute or the order of the board, or that his house was not a tenement house within the provisions of the act. It would seem that both might also be shown in the suit to recover the expense of making the improvement; for the former would go to the question of reasonableness, and the latter to the jurisdiction of the board.

In considering the exercise of judicial review we must distinguish between the power merely to annul, and the capacity to amend or revise. Where there is involved the validity of a regulation general in scope, whether the question arise in a suit for a penalty or for the expense of administrative enforcement, or in a bill to enforce compliance or to restrain execution, the court in disapproving of the regulation or of one of its separable provisions, must limit itself to the declaration that it is null. It cannot make a new regulation.

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[44] *Supra*, p. 341.

[45] Not over nine persons were supposed to have died from the disease and no living persons were known to have contracted it. Yet the regulations isolated twelve blocks containing twelve thousand inhabitants, permitting free intercourse between all persons within the area, but forbidding all ingress or egress. Such regulations, thought the court, would tend to spread rather than to restrict the disease. A Chinese grocer complained because his trade was interfered with. An additional reason for granting the injunction was found in the fact that the regulations appeared to be enforced only against the Chinese.

[46] *Supra*, p. 334.

It is subject to the same incapacity in all suits for a penalty, whether the order be general or special. Where, however, the order is special, relating only to an individual case, whether based on circumstances peculiar to that case, or on the contention that it falls within some more general ruling, the court may enjoin or enforce it, either in whole or in part. If the suit is for the expense of administrative enforcement, the claim may be disallowed in whole or in part.

An administrative order may be declared invalid either because the court deems it improper to vest so wide a discretion in an administrative body,[47] or because the action taken transcends the delegation.[48] Nor will it necessarily save an administrative regulation to establish that the statutory warrant is manifest and that the power delegated is not legislative. For the courts maintain a firm control over the power even of the legislature to interfere with liberty and property under the guise of the police power. Many decisions, therefore, which declare invalid an administrative regulation or order, proceed upon grounds equally applicable to the same provisions contained in legislative enactments.[49]

The ground of invalidity usually alleged is that the order is unreasonable. This may mean either that it would be an unwarranted interference by whomever exercised, or that the legislature did not mean to delegate authority to exercise power to this extent. The courts always assume that the legislature does not mean to delegate to an administrative body the power to do anything which in the opinion of the court is unreasonable. And they are more ready to predicate unreasonableness of the action of administrative bodies than of that of the legislature.[50]

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[47] State *ex rel.* Adams *v.* Burdge *et als.*, 95 Wis. 390 (1897). Here it was said that the provisions of the statute import and include an absolute delegation of the legislative power over the entire subject involved, and that the action of the board was legislative and not administrative.

[48] Philadelphia *v.* Provident, etc. Trust Co., 132 Pa. St. 224 (1890); Wreford *v.* People, 14 Mich. 41 (1865).

[49] State *v.* Speyer, 67 Vt. 502 (1895); *Ex parte* O'Leary, 65 Miss. 80 (1887).

[50] This is best illustrated by comparing the attitude of courts towards provisions in statutes with that towards similar provisions in administrative regulations, requiring compulsory vaccination or excluding unvaccinated pupils from the public schools. The former requirement is sustained in statutes, Jacobson *v.* Massachusetts, 197 U. S. 11 (1904), and regulations passed by virtue of explicit statutory authority, Morris *v.* Columbus, 102 Ga. 792 (1897); the latter, in statutes, Abeel *v.* Clark, 84 Cal. 226 (1890), and regulations under similar specific statutory delegation, Bissell *v.* Davison, 65 Conn. 183 (1894). In this case the court declined to hold the power conditioned upon the

An examination of the cases will demonstrate the impossibility of ascertaining the *criteria* of reasonableness. Of reasonableness as a test, Mr. Justice Holmes has observed: "It may be said that the difference is only one of degree; most differences are when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be except by the exercise of the right of eminent domain." [51]

Though it is often said that the state in the exercise of the police power does not "take" property, but merely " regulates its use," [52] the distinction seems somewhat refined. There would seem to be in all these "regulatings" which involve the payment of money or restriction of action, a deprivation either of liberty or property. The problem is to discover whether it may be justified as a proper exercise of the police power. This the courts must solve without the aid of definitions in any constitution. They have themselves developed the doctrine of the police power as an implied qualification or limitation of the Due Process clauses of our various constitutions, and are free to control its application as they will.

The difficulty of securing an exact definition of the power may be appreciated, if not solved, by referring to a recent utterance from the Supreme Court:

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded,

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actual existence of an epidemic or on reasonable apprehension thereof, saying that the statute had imposed no such condition, and that there was no reason why it should be implied.

But where the delegation in the statute is couched in such general terms as "to take action in the interest of the health and lives of the community," the administrative regulations, though usually sustained in the presence of epidemic, Duffield *v.* School District, 162 Pa. St. 476 (1894), Blue *v.* Beach, 155 Ind. 121 (1900), are in the absence of actual or threatened epidemic quite generally declared invalid because unreasonable. Matthews *v.* Board of Education, 127 Mich. 531 (1901); State *ex rel.* Adams *v.* Burdge *et als.*, 95 Wis. 390 (1897); Potts *v.* Breen, 167 Ill. 67 (1897).

Where the decision is not grounded on unreasonableness, the courts usually assert that the general power delegated should be construed as meaning to authorize action only in the presence of immediate danger.

[51] Rideout *v.* Knox, 148 Mass. 368 (1889).

[52] Health Department *v.* Trinity Church, *supra*, p. 334.

and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points along the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. . . . It constantly is necessary to reconcile and adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others." [53]

In another recent opinion the same jurist observes:

"And yet again the extent to which legislation may modify and restrict the uses of property consistently with the constitution is not a question for pure abstract theory alone. Tradition and the habits of a community count for more than logic." [54]

"In the long run," says Professor Seligman, "the economic interests of a community must prevail; for law is nothing but the crystallization of economic and social imperatives." [55]

We shall be aided then more by the method of enumeration than of definition. Whether or not the "Supreme Court follows the election returns," as one of our sagacious humorists avers, it is beyond dispute that popular feeling on matters relating to the conflicting interests of the individual and the group to which he belongs, exerts a potent influence upon the chosen arbiters of constitutional questions. Any attempt, therefore, to forecast the decisions of the future limiting the extent of interference to be permitted as an exercise of the police power, must recognize that the courts will be governed more by the currents of public opinion than by the store of ancient precedents.

Thomas Reed Powell.

BURLINGTON, VT.

[*To be continued.*]

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[53] Mr. Justice Holmes, in Hudson County Water Co. *v.* McCarter, 209 U. S. 349 (1908).

[54] Laurel Hill Cemetery *v.* San Francisco, 216 U. S. 358 (1910).

[55] 25 Pol. Sci. Quar., 217.

CORPORATE PERSONALITY.

[*Continued.*]

IN the former portion of this article, some of the leading foreign theories as to the nature of corporate personality, which in recent years have been promulgated by French, German, and Italian jurists with indefatigable industry and notable learning and brilliance, were briefly outlined; a short statement was made of the traditional doctrine of Anglo-American law upon the subject, and some of the inconsistencies of that doctrine were mentioned; and afterwards an examination of the subject on principle was begun. The result of this examination was the conclusion that a corporation, or indeed any group or succession of men — such as the Church, or an army, or a political party — is a real entity — something other than the mere sum of the members for the time being; but that this entity is actually impersonal, and is regarded as a person only by way of metaphor or by a fiction of law. We now proceed to test this theory that a corporation is a real but impersonal entity, which is personified by a legal fiction or metaphor, by applying it to various situations and questions which arise in corporation law. We shall then consider the use, if any, of the fiction of corporate personality, and certain classes of errors in its application. Lastly, the article will conclude with a practical suggestion as to the best method of treating and studying the doctrine of corporate personality.

V.

Most of the objections which have been so strongly urged in France and Germany against the fiction theory of corporate personality will be found upon examination to militate against the theory that the corporate entity is a fiction rather than against the theory that the personality of that entity is fictitious. For instance, one of those objections is that the state, the sovereign, the source of law and fountain of justice, cannot be a fiction;[1] and

[1] Michoud, La Théorie de la Personnalité Morale, secs. 9–12.

that therefore no theory can be tenable which would treat the existence of all corporations, including the state, as fictitious. But the simple reply is that while the personality of the state is a fiction, the existence of the state as an entity is real. The state, like other corporations, is actually an impersonal entity; by a legal fiction or metaphor, that impersonal entity is regarded as a person.[2] Uncle Sam is a fictitious person; but the government of the United States is a reality.

This theory of the nature of corporate existence and personality — the one being real, the other imaginary or metaphorical — will be found to remove many of the historic difficulties which the courts have encountered in corporation law.

For example, if the corporate personality is imaginary, there is no limit to the characteristics and capacities which may be attributed to that personality. Thus, the old difficulty, which so long troubled our courts, that a corporation has no mind and is therefore incapable of entertaining malice, of contriving a fraud, or of doing any other act involving a mental state, vanishes. If you can imagine that a corporate entity is a person, you can also imagine that this person has a mind. Consequently, corporations can be guilty of fraud, of malice, or of crimes involving a particular mental state. To take the opposite view would be like arguing that Hamlet must have been insane, because he was a fictitious person and therefore could have no mind.

Similarly, the famous *dictum* of Sir Edward Coke that corporations cannot be excommunicated because they have no souls, is seen to be illogical. This is illustrated by the history of the canon law, from which Coke derived his statement. Thus, Innocent IV held that corporations, or *universitates*, could not take an oath, or be baptized or excommunicated, because "*universitas non habet corpus nec animam, est res inanimata*";[3] but later it was reasoned, "*licet non habeant veram personam, tamen habent personam fictam fictione juris, et sic eadem fictione animam habent et delinquere possunt et puniri.*"[4]

To this power of the legal imagination the only limit — if limit

[2] Hence it is not true, as stated by M. Michoud, in La Théorie de la Personnalité Morale, sec. 11, that only the conception of the state as a person can save its unity.

[3] Ferrara, Le Persone Giuridiche, 77; Binder, Das Problem der juristischen Persönlichkeit, 4.

[4] Binder, Das Problem der juristischen Persönlichkeit, 6.

it can be called — is set by the futility of extending to an absurdity the conception of corporate personality. For instance, it is often said that a corporation cannot be imprisoned, because it has no body.[5] Now, this statement is not logical. For if we can imagine a corporation to be a person, we can also imagine that this person possesses a body capable of being imprisoned. The law is, therefore, able to impute to a corporation a body and to imagine this body as imprisoned. But *cui bono?* A threat of imaginary punishment would not deter any rational being from wrongdoing; and we have seen above that only rational beings can be subject to the law's commands. To be sure, if the imaginary imprisonment of the corporate person involved the actual imprisonment of some of its members, the latter might be deterred from illegal action on behalf of the corporation by the fear of such punishment. The law refrains from the conception of imprisonment of the corporate person not because the legal imagination cannot go to that length, but because to carry the metaphor so far would provoke a smile, and would serve no good purpose.

It follows, also, that *in rerum naturâ* there is no distinction between a personified entity and an entity not personified. All such distinctions depend on positive law. For instance, one state may personify a body of men which the law of their domicile and of their organization expressly declares shall not be personified.[6] The legal imagination can personify a body of men however loosely bound together; and on the other hand it may refrain from personifying a body of men whose organization is of a character ordinarily and naturally regarded as corporate. There is, therefore, no *régime personnifiant*, as a brilliant French writer has contended.[7] There are some associations which it is more *natural* to personify than others; there are none that it is *impossible* to personify.

For example, the human mind is so constituted that it is difficult not to personify a compact hierarchy like the Roman Catholic Church. We instinctively speak and think of that organization as a person; and the law finds it difficult or impossible to refrain from doing the same.[8] But the power of imagination is not strained

[5] 1 Bl. Comm. 476.

[6] Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566.

[7] De Vareilles-Sommières, Les Personnes Morales, sec. 847 *et seq.*

[8] Ponce *v.* Roman Catholic Church, 210 U. S. 296.

to its utmost by regarding such a close organization as a person. On the contrary, the most extreme Protestant, whose conception of the Catholic Church is that of a disorganized, incoherent, scattered body of believers, nevertheless personifies that disconnected number of men, who are bound together by no organic tie; and he uses in reference to them the same personal pronouns, adjectives, and appellations that are applied to the Roman Catholic Church. Even a purely inanimate object may be personified.[9] For instance, in admiralty law a ship is to some extent personified.

Consequently, the distinction between a personified company, or corporation, and an unincorporated company, or company not personified, depending as it does upon positive law rather than upon any natural differences between the two classes of companies, is of the haziest character. When the matter is considered in this light we see the reason for the difficulty, not to say impossibility, which has been encountered in attempting to draw the line between an incorporated or personified body and an unincorporated body. What is the criterion? Is it limited liability? Surely not; for there are corporations the liability of whose members is unlimited, and unincorporated companies whose members enjoy limited liability. Is it continuous succession, or the capacity for transfer or transmission of shares? That cannot be; for membership in some corporations is not transferable, while shares in many unincorporated companies may be freely aliened. We might go on through the whole list of usual distinctions between incorporated and unincorporated associations, and demonstrate that no one of them is controlling. The case becomes still clearer when we note that in French law one of the most strongly emphasized distinctions between a personified company and a com-

[9] "In popular language, and in legal language also, when strictness of speech is not called for, the device of personification is extensively used. We speak of the estate of a deceased person as if it were itself a person. We say that it owes debts, or has debts owing to it, or is insolvent. The law, however, recognizes no legal personality in such a case. The rights and liabilities of a dead man devolve upon his heirs, executors, and administrators, not upon any fictitious person known as his estate. Similarly, we speak of a piece of land as entitled to a servitude, such as a right of way over another piece. So, also, in the case of common interests and actions, we personify as a single person the group of individuals concerned, even though the law recognizes no body corporate. We speak of a firm as a person distinct from the individual partners. We speak of a jury, a bench of judges, a public meeting, the community itself, as being itself a person instead of merely a group or society of persons." Salmond, Jurisprudence, 2 ed., 283.

pany not personified is that in the former case the joint creditors enjoy a preference in respect to the joint assets over the separate creditors of the several members, while in the case of a company not personified the joint creditors and separate creditors rank *pari passu*.[10] Yet we of the common law are quite familiar with the fact that with us, even in the case of a mere partnership, which is not personified, the joint creditors are entitled to a preference. The truth is that there is no characteristic, and no group of characteristics, which can be possessed by no companies except such as *must* be regarded as incorporated or personified. The law can personify any group or succession of men whatsoever, and yet may provide that it shall not possess any one of the usual characteristics of a corporation; and conversely it may declare that an association which possesses none of those characteristics shall nevertheless be personified.

VI.

What then, it may be asked, is the advantage of the exercise of the legal imagination by personifying some groups of men? Cannot the state legislate directly? Why does it need the aid of a fiction? asks M. de Vareilles-Sommières.[11] Then that witty writer takes up one by one the supposed results of the personification of the corporate entity, and demonstrates conclusively that each and all of them, as stated in the last paragraph, may be laid down by the law without the aid of any fiction, and without the intervention of any imaginary personality.[12]

Nevertheless the personification of the corporate entity serves

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[10] 2 Lyon-Caen et Renault, Traité de Droit Commercial, 4 ed., 106–108.

[11] De Vareilles-Sommières, Les Personnes Morales, sec. 382: "Pourquoi, encore une fois, la loi recourrait-elle à la fiction? Pour s'autoriser elle-même à prendre des mesures qui sont justes ou utiles? A-t-elle besoin de ce détour? Ne peut-elle aller droit au but? N'est-elle pas la maîtresse absolue de faire les règles qu'elle croit bonnes, sans avoir à justifier d'autre chose que de leur sagesse? Les lois sont les rapports nécessaires qui découlent de la nature des choses; c'est dans les entrailles de la réalité et non dans la domaine de l'imagination qu'elles ont leur raison d'être et leur justification. Quel législateur peut avoir l'étrange idée de se croire obligé de créer un fantôme pour donner satisfaction à des intérêts pratiques, et de rattacher à une chimère des mesures réclamées par le bien public?"

[12] De Vareilles-Sommières, Les Personnes Morales, secs. 383–389.

many a useful purpose. If a code of corporation law could foresee and provide for every possible case to arise in the future, then indeed, as contended by M. de Vareilles-Sommières, it might dispense with personification of the corporate entity, and might legislate directly for every conceivable case. But, unfortunately, it is impossible thus to provide explicitly for every conceivable case. In spite of every precaution, the *casus omissus* will occur; and when it does, then the doctrine of corporate personality comes into play. For the law, recognizing its inability to provide specifically for every case that may arise, after laying down certain rules which make the personification of the corporate entity natural and almost inevitable, — limited liability, continuous succession, unified management, power to sue and be sued, and to take or convey property in the corporate name, — goes on to exact, in effect, that in all other cases, not expressly so provided for, the company shall be treated as if it were a person, or in other words shall be conceived of as a person, or shall be an imaginary or fictitious person.[13]

The conception of corporate personality is a simplification of the processes of thought. Its function is similar to that of an algebraic symbol. A mathematician finds it difficult to carry in his head a complicated expression such as $x^2 + 3ax + b^2$; and in order to simplify his mental processes he says to himself, "Let $y = x^2 + 3ax + b^2$," and then he uses y in his calculations instead of the longer and more cumbrous expression. So it is with the imaginary corporate personality in legal calculations. The lawyer finds himself unable to solve his problems if he thinks of a corporation not as a personified unit but as a shifting body of shareholders, or even as a real but impersonal entity; and he therefore says to himself, in effect, "Let the corporate personality equal the changing body of shareholders in respect to their relations to the joint property." By substituting the more compact idea for the more elaborate, he is enabled to reach correct results with less mental effort.

The mathematician recognizes that his a's and his b's, his x's and y's, have no existence except in his imagination, and that when he attempts to apply his calculations to practical affairs — for example, to determine the stress which a bridge is capable of

[13] *Cf.* Willmott *v.* London Road Car Co. [1910], 2 Ch. 525.

bearing or the distance which a projectile will carry — he must convert his symbols into figures; but he does not overlook the assistance which those symbols have been to him in obtaining his practical results. So a judge, in order to work out a problem in the law of corporations, often finds it convenient to make use of the imaginary corporate person in his calculations; but he must recognize that ultimately the effect of his decree, although it may be expressed in terms of the corporate personality, must be the determination of the rights and liabilities of actual human beings.

Let us take an illustration of this use of the corporate fiction. The regulations of a certain company provide that the directors may exercise all the powers of the corporation except that no bonds shall be issued or mortgage executed without the prior approval of a shareholders' meeting. Nevertheless, without such approval, the directors issue bonds, and execute a mortgage to secure them. Are the bonds valid secured obligations of the company? In order to solve this problem, it is convenient to conceive of the corporation as a personality giving commands to the directors as his or its agents. We say, therefore, that we will regard the bonds as issued by the directors as agents of the imaginary corporate personality in violation of restrictions upon their authority; and as third persons, dealing with the agents, could not justly be expected to see to compliance with such restrictions, therefore, applying the law of agency, we reach the conclusion that the bonds are valid in the hands of innocent third persons. We then drop the symbol of the corporate personality which has been useful to us in reaching our conclusion, and we express the net result in terms of the rights of actual persons by adjudging that the bondholders take the assets and the shareholders get nothing.

VII.

The application of this doctrine of corporate personality seems to be beset with pitfalls as well for the cautious as the unwary.

On the one hand is the temptation to shrink from a logical application of the doctrine, and to refuse to apply it in cases where it ought to be applied. For, if we are to use this conception of a corporation as a person — and we have seen above that we can

escape from reasoning to some extent in terms of that conception — we must carry it out consistently. We cannot capriciously drop the corporate personality from our legal reasoning at any moment when the inclination strikes us. Imagine a mathematician who, at some stage of an intricate problem, should suddenly say to himself, "The square root of minus one is a mere figment of the imagination. I will simply draw a pen through the square root of minus one in this term of this equation; for surely no harm can result from striking out a fictitious and imaginary quantity." Such a mathematician would soon find himself in difficulties, and his final result would be tainted with error. So it is with a lawyer who at some stage of a problem in corporation law determines unceremoniously to drop the conception of a corporation as a person, in order, as he thinks, to eliminate from the calculations a complicating factor. He confuses instead of simplifying his reasoning, and he vitiates the soundness of his conclusions.

The fact that in a particular case the application of the rule that a corporation is to be treated as a person will work hardship is no reason whatever for departing from the theory. For example, if the theory of a corporate entity is to be of any assistance to the courts, actions or suits to redress injuries to the corporation must be brought in the corporate name. Now, if by a blunder of a solicitor, a suit is brought not in the name of the corporation but in the individual names of all the shareholders, hardship may be caused in a particular case by dismissing the bill. Perhaps the statute of limitations would bar a new suit in the name of the corporation. Yet of course that hardship is no reason whatever for permitting the suit by shareholders in their own names to be maintained, in violation of legal theory.

To take another illustration, suppose that one man acquires all the shares of a corporation and then by deed in his own individual name conveys to A a tract of land the title to which is vested in the corporation. The temptation is strong to hold that A gets a good legal title to the land;[14] for why should he suffer loss because the law regards the corporation as a person and does not recognize a deed by the shareholders as equivalent to a deed by the corporation? Nevertheless, to hold that A has a good legal title to the land would be a departure from the theory of a corporation as a

[14] Swift *v.* Smith, 65 Md. 428.

person and, while it might avoid hardship in some particular case, would in the long run work more injustice that it avoids. For instance, if such a deed conveys a good title at law, a subsequent *bonâ fide* purchaser from the corporation would get no title to the land, although the land records would furnish him no information that the title had passed from the corporation; for of course the deed in the name of the shareholder would not be indexed under the name of the corporation, so that a conveyancer examining the records for conveyances by the corporation would be quite unable to find the deed.

When tempted to disregard the doctrine of corporate personality, we may often find it helpful to concentrate attention, not upon that legal dogma, but upon the hard-and-fast rules of law which have been deduced from the dogma or from which that dogma has been deduced.[15] For instance, the rule that actions or suits to enforce corporate rights must be in the corporate name may have been deduced from the legal rule that in all *casus omissi* a corporation shall be regarded as if it were a single person, or it may have been one of the rules specifically prescribed for the government of companies, which induced the generalization that such companies shall be regarded as if each were a single person; but, whatever may have been the historical origin of the rule, it is now as well fixed in the law as if some act of the legislature expressly provided that all actions to enforce corporate rights shall be instituted in the name of the corporation. Consequently in enforcing that rule the courts need not now resort to the doctrine of corporate personality to justify their decisions; to do so is rather confusing. When a court is asked to suspend that rule in favor of some particular litigant, as in the case suggested in a former paragraph, the question is not so much whether the court will "go behind the corporate entity" as whether it will suspend an established rule of law, which may or may not have had its origin in the doctrine of corporate personality.

The difficulty comes where no controlling rule has been laid down by statute or by authoritative judicial decision and where the question arises whether, in some case not specifically so gov-

[15] As to the divergence of opinion whether certain rules of law are the causes or the consequences of the personification of corporations, see de Vareilles-Sommières, Les Personnes Morales, sec. 482.

erned, a corporation shall be regarded as if it were a person. For instance, a statute is passed applicable to "persons." Are corporations within that statute? This is a question which, in the absence of any clear indication of legislative intent one way or the other, may properly be decided by applying the legal fiction of corporate personality. In all such cases, however, considerable latitude must be allowed to judicial discretion.

But the temptation to apply the doctrine of corporate personality too sparingly is much less insidious than the temptation to apply it too freely. For notwithstanding the indispensable assistance which is afforded by the conception of a corporation as a person in solving legal problems, yet that idea should not be exalted into a divinity, or a great mysterious dogma, before which as loyal disciples of the common law we must stand in reverent awe, believing where we cannot prove. There is no command to fall down and worship the imaginary corporate personality, like the golden image which Nebuchadnezzar set up. Still less should the doctrine of the corporate fiction be treated as an oracle to be consulted on every question in corporation law. It does not, like Wamba's "*Pax vobiscum*," constitute an answer to every question. To the points at issue in the great majority of cases in corporation law that now come before the courts, the doctrine of the corporate fiction is quite irrelevant, and only harm can come from attempting to apply it.

For example, take a recent case in which the Supreme Court of the United States and the Supreme Court of Massachusetts have differed in opinion. The facts were, in brief, as follows: Certain promoters had organized a corporation for the purpose of buying certain property to which they themselves held the title. The sale was made and consummated at a time when they and their confederates constituted the board of directors and held all the outstanding shares of the corporation, so that all the persons then interested were fully apprised of the facts. The total authorized number of shares had not, however, at that time been issued, but the promoters contemplated offering them for public subscription. Afterwards, they were subscribed and taken by the public. The new subscribers thus obtained control of the corporation and ascertained that the price paid to the promoters for the property was excessive. The question was whether the sale could be impeached

by the corporation as constituted after the public subscribers had become members. The Supreme Court held that it could not;[16] and the reason assigned was that the corporation after the public subscription of the shares continued to be the same entity as it was at the time the purchase was made with the full and free approval of every person then holding shares. Now, it is submitted that in thus lugging in, if the expression may be pardoned, the doctrine of the corporate entity, the court merely diverted attention from the real issue. Without doubt, a corporation is a legal entity so that if it was irrevocably bound at the time the purchase was made, the fact that other persons who were kept in ignorance of the true circumstances subsequently became shareholders would not confer upon the entity the right to undo a transaction by which it had formerly been bound. But what was the real question before the court? Was not the real question whether or not the corporation in the first days of its organization, when its destinies were in the hands of promoters who contemplated transferring control to future subscribers, was under a disability, in a court of equity, analogous to that of infancy, so that its consent given at that time was no less voidable than the consent of an infant would have been? With that question the doctrine of the corporate personality had nothing whatever to do.

Yet many lawyers find as great difficulty in keeping the doctrine of corporate personality out of their legal reasoning as Mr. Dick experienced in keeping Charles the First's head out of his memorial.[17] Infinite harm has come from assuming that the doctrine of the corporate fiction will solve all problems in the law of corporations.

One cause of this unfortunate tendency to regard the corporate fiction as a touchstone to be applied to all questions connected with corporations — a tendency which is evinced by those who affect to disapprove the doctrine that a corporation is a separate entity or personality, almost as much as by those who earnestly preach that doctrine — one cause of this tendency is the belief

[16] Old Dominion Copper Co. *v.* Lewisohn, 210 U. S. 206. *Contra*, Old Dominion Copper Co. *v.* Bigelow, 188 Mass. 315, 89 N. E. 193. See also Mason *v.* Carrothers, 74 Atl. 1030 (Me.).

[17] For instance, a learned Italian writer, after mentioning a long list of mooted questions in company law, adds, "A tutte queste domande è la teoria della personalità giuridica che deve dare una risposta." Ferrara, Le Persone Giuridiche, 2.

that has been noticed above that the conception of the corporate entity is something very technical. We lawyers are naturally prone to take an especial interest in those rules of law which are most inexplicable to the lay mind. We like to perch ourselves upon some pinnacle of learning from which we may look down with complacency upon the whole world that lieth in darkness at our feet. This is the secret of the fascination of the rule in Shelley's Case for many lawyers. It is a sacred mystery into which the uninitiated cannot pry. In consequence of the scholastic terms in which the doctrine that a corporation is an entity, and that this entity is a person, has been handed down to us, we have erroneously come to regard it too as one of these mysteries of the profession, and have therefore taken a delight in applying it on all possible occasions — even on some occasions in which its application was in reason impossible.[18] The writer cannot claim an exemption from this tendency to apply the doctrine of the corporate fiction to cases where it properly has no application.[19] But the subtlety of this temptation ought to serve as a warning against this dangerous error of overestimating the importance of the denial, or acceptance, of the conception of a corporation as a legal entity or person, and of treating the doctrine as the decisive point in many cases with which it really has nothing to do.

Particularly, in any discussion as to the justice or injustice of a proposed rule, the fiction of corporate personality is altogether irrelevant. The corporate fiction has no proper place in legislative debates. In order to determine whether a law is just or unjust, its effect upon *men*, and not corporate personalities, must be considered. Yet nothing is more common than an effort to justify the justice or policy of certain laws by means of the doctrine of corporate personality. Thus, in the French Revolution, the republicans sought to justify confiscation of property belonging to corporations, under the plea that the property in question belonged, not to human beings, but to legal personalities whose existence depended upon the gracious pleasure of the state and might therefore be terminated at any time, so as to leave their property

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[18] See passage from de Vareilles-Sommières, Les Personnes Morales, quoted *infra*, note 25.

[19] See 10 Col. L. Rev. 183, criticising, perhaps not without justice, a statement by the present writer.

without an owner and to cause it to escheat to the state.[20] We stand aghast at these excesses; but even in America similar excuses for unjust laws are often heard in our halls of legislation.

The distinction between the abuse and the legitimate use of the doctrine of corporate personality may be made clearer by a concrete case. The question has often arisen whether the dispensing of liquor by an incorporated club to its members is within the meaning of laws regulating or prohibiting the sale of intoxicating liquors; and a majority of the courts before whom the point has come have held, applying the doctrine of the corporate fiction, that when an incorporated club, which is in law a person, transfers liquor to one of its members, a sale takes place from one person to another, and that such a transfer is therefore within the statute. This is a perfectly proper application of the doctrine that a corporation is to be regarded in law as if it were a person. But suppose the question should come before the legislature whether such laws ought to be so framed as to exempt incorporated clubs selling liquors to their members. Opponents of such an exemption would be very apt to base their arguments in part upon the doctrine of corporate personality, and to contend that because a corporation is a legal person it ought in reason and justice to be governed by the same rules as other persons. Yet it is perfectly clear that the legislature can only be confused by such an argument. For the justice or injustice, the policy or impolicy, of the proposed exemption must be judged with reference to actual facts and not with reference to legal fictions.

Another illustration of the mistaken extension of the corporation fiction to the domain of politics will suffice. Gladstone, in his Tory days, reasoning in support of a religious establishment, contended that the state is a person, and therefore bound like natural persons to maintain divine worship. He was, of course, not so illogical as to base his argument on any legal fiction that the state is a person, but he reasoned, or assumed, with Gierke and his school, that the entity formed by the coöperate union of natural persons is a real person. Had he adopted what we conceive to be the true doctrine that such an entity is really impersonal and is regarded as a person only by way of metaphor or legal

[20] De Vareilles-Sommières, Les Personnes Morales, 65; 1 Michoud, La Théorie de la Personnalité Morale, 380–381.

fiction, the fallacy of founding an argument in support of a state church on so sandy a foundation would have been apparent. As it was, his critic, Macaulay, confuted him by a *reductio ad absurdum*, showing that every collection of individuals is a person in the same sense as the state, so that Gladstone's argument would lead to the absurdity that every collection of individuals would be bound to support a church. Said Macaulay:

"Is it not perfectly clear that this argument applies with exactly as much force to every combination of human beings for a common purpose as to governments? *Is there any such combination in the world, whether technically a corporation or not, which has not this collective personality* from which Mr. Gladstone deduces such extraordinary consequences? Look at banks, insurance offices, dock companies, gas companies, hospitals, dispensaries, associations for the relief of the poor, associations for apprehending malefactors, associations of medical pupils for procuring subjects, associations of country gentlemen for keeping foxhounds, book societies, benefit societies, clubs of all ranks, from those which have lined Pall Mall and St. James's Street with their palaces, down to the Free-and-easy which meets in the shabby parlour of a village inn. Is there a single one of these combinations to which Mr. Gladstone's argument will not apply as well as to the state? In all these combinations, in the Bank of England, for example, in the Atheneum club, the will and agency of the society are one, and bind the dissentient minority. The Bank and the Atheneum have good faith and a justice different from the good faith and justice of the individual members. The Bank is a person to those who deposit bullion with it. The Atheneum is a person to the butcher and the wine-merchant." [21]

VIII.

Above all, we should lay to heart the utter futility, and worse, of speaking or thinking of a corporation as "endowed by the state with personality." Such expressions are very common both with us and on the Continent of Europe. Yet they are devoid of value. So far as corporate entities are real, they rise into being whenever men coöperate for a common purpose, quite independently of the state. The state may strive to suppress them, as many rulers have done; but the difficulty which such rulers have

[21] Macaulay's "Gladstone on Church and State," Works (London, 1875), vol. 6, p. 337.

encountered is enough to demonstrate that the beings they sought to suppress were not created by the power which found such difficulty in suppressing them.[22] Indeed, we ourselves see how the state is sometimes forced to recognize in part the existence of *de facto* corporations which, being formed contrary to its laws, certainly cannot be regarded as created by it. Moreover, if corporations are endowed with personality by the state, who endowed the state, which also is a corporation, with that mysterious attribute? [23] On the other hand, so far as a corporate entity is personal, its personality is fictitious, or metaphorical; and it is not "endowed with personality by the state" for the simple reason that its personality is imaginary. As well speak of John Doe or Richard Roe as endowed by the state with personality.

Still more erroneous is it to speak of corporate personality as a *privilege* conceded by the state. This notion that corporate personality is some mysterious gift from a higher power, bestowed like manna from heaven, goes back, like so much that is confusing in this matter of the corporate entity, to the Roman law.[24] Corporate personality is not a concession from the state, and it is not properly a privilege. So far as it is real, it is a fact recognized but not created by the state; and so far, if at all, as it comes from the state, it is imaginary, and is, therefore, like any other imaginary gift, of no value. All manner of injustice and false reasoning have resulted from the conception of corporate personality as a great privilege presented to loyal subjects by a gracious sovereign.[25]

That the mysterious personality attributed by the courts to an incorporated body of men is of little or no deep legal importance is taught by the extraordinary difficulty of determining whether a given body of men possess this attribute of legal personality, and the uncertainty of the consequences which should follow from its possession. What are the necessary legal consequences of endowing a body of men with this mysterious attribute of a corporate

[22] 1 Michoud, La Théorie de la Personnalité Morale, 33–34.

[23] *Id.*, p. 27.

[24] Ferrara, Le Persone Giuridiche, 41.

[25] *Cf.* de Vareilles-Sommières, Les Personnes Morales, sec. 478. "Ceux qui s'imaginent que la personne morale est une création de la loi son forcément inclinés à croire que c'est pour obtenir des résultats extraordinaires que le législateur tire cet être du néant. Il faut découvrir de graves effets à ce prodige. Dans ces dispositions et dans cette nécessité, on rattache à la personnification des phénomènes qui ont une toute autre raison d'être, et désormais on les tient pour impossible en dehors de l'association personnifiée, alors qu'ils sont naturels et légitimes dans toute association."

personality? What vital distinction is there between a corporation and a voluntary association? The courts have never been able to find a satisfactory answer. Such intangible distinctions ought not to be emphasized by the law.

Of course, there may be fine distinctions that are yet of great importance. But in all such cases, however great may be the difficulty of drawing the line, yet as soon as it has been determined that a case falls on a particular side of the line there is no doubt that very different rules are to be applied than if it had fallen on the other. In such cases the distinction, however difficult to draw, is very useful, and indeed indispensable. Thus the distinction between a mushroom and a toadstool may be a fine one, but it cannot safely be ignored. Whatever may be the difficulty in determining to which class a certain fungus belongs, when once that question is answered there is no doubt at all but that the growth is to be treated very differently from the way it ought to have been treated if it had been determined to belong to the other category.

There are many instances in the law of similar fine but necessary distinctions. For instance, take the distinction between a vested and a contingent remainder. Nothing may be more difficult than to determine whether a given limitation in a deed or will is vested or contingent. Lawyers constantly differ upon the question; and the judges, who are forced to decide one way or the other, doubtless often feel that a toss of a penny would furnish the most satisfactory mode of reaching a conclusion. Yet, if once the limitation in question is decided to be vested, there is no doubt about the rules of law by which it is to be governed, and no doubt that those rules of law are very different from those that would have applied if the limitation had been determined to be contingent. Such a distinction is serviceable.

The distinction between those associations which are to be regarded as fictitious legal persons, or in other words corporations, and those which are not, is not of this character. One association will possess certain rights and attributes and be subject to certain liabilities; and the courts will pronounce it a corporate entity. Another association will be judicially declared not to be such an entity, and yet it will possess according to the laws under which it is formed exactly the same rights and attributes and be subject to exactly the same liabilities as the other association.

IX.

What then is the practical conclusion? What are the results of this discussion? The conclusion is that the somewhat confused and self-contradictory statements which we have inherited through Coke and Blackstone from the Roman law and the canon law, and the modern metaphysical discussions in Europe about the nature of corporate personality, combine to teach that we shall walk most safely if we pay least heed to our footsteps, trusting to nature and to common sense to guide our feet in the way they should go. The doctrine of corporate personality is a natural though figurative expression of actual facts. It is only by study and artificiality that we can train ourselves to make it confusing or misleading. The best method of dealing with the doctrine that a corporation is a legal personality is, therefore, to think less about it. The conception itself is a natural one. We do not need to be instructed to regard a corporation as an entity and to regard that entity as a person: our minds are so constituted that we cannot help taking that view. Being a natural conception, it will tend to find its proper place in the law, if only we cease to regard it as something mysterious or technical.

Arbitrary, technical rules must be carefully studied in order to be properly applied. For example, nobody would assert that the application of the rule against perpetuities could safely be left to the natural man. But in applying natural rules or principles, study leads to artificiality. If the truth that twice two makes four had been stated as an abstruse technical doctrine and embedded in a mass of legal terms, we should be much less liable to error by trusting to the multiplication table than by striving to understand and bear in mind the technical statement.

The case with respect to the doctrine of the corporate entity, although similar in kind, is unfortunately not so simple. In the first place, the conception of a corporate personality, although natural and simple, is not so natural or so simple as the conception of twice two as equivalent to four. Consequently, it is not possible to the same extent to dispense with explanations of its legal effect. In the second place, we cannot by an effort of will efface the memory of the familiar terms in which from the earliest days of our legal

education we have heard the doctrine of the corporate entity stated. But we can, and should, fully recognize that the conception is simple and natural, and should endeavor to apply it, though logically and consistently, yet simply and naturally, and not artificially. This is the explanation of the fact, observed with wonder by some jurists, that all the scholarship which has been devoted to the subject in Europe in recent years has only served to increase the confusion.[26]

The feasibility of treating the doctrine naturally and yet logically is shown by the state of the law in England. The English courts apply the doctrine at least as logically and consistently as the American courts — perhaps more logically and consistently than we do — and yet the doctrine has received an insignificant degree of consideration in modern English law. Our nomenclature, "law of corporations," tends to accentuate the importance of the doctrine of corporate personality, whereas the corresponding expression in England, "law of companies," tends to relegate it to its proper place. Lord Lindley's great work on the law of companies, from beginning to end, contains no definition of a corporation, and no discussion of the distinction between a corporation and an unincorporated company. Mr. Hamilton begins his treatise with a definition of a corporation;[27] but he is obliged to resort to an American case as the source of the definition,[28] and from that point on has little or nothing to say on the subject. The very title of Lord Lindley's book, "The Law of Companies considered as a Branch of the Law of Partnership," shows that he is not troubled by abstruse distinctions between companies that are, and those that are not, metaphysical legal persons. Yet, if an American lawyer should publish a book under Lord Lindley's title, he would probably find few purchasers. To the old-fashioned American lawyer it would seem about as reasonable to speak of the law of corporations as a branch of the law of partnership, as to speak of the law of libel as a branch of the law of contingent remainders.

This, then, is the comforting conclusion. We need only trust

[26] Ferrara, Le Persone Giuridiche, 3. "È singolare che le numerose e sempre più acute e penetranti ricerche, invece di chiarire il problema, l'hanno di più complicato." See also the same work, 131–132.

[27] Hamilton, Manual of Company Law, 1.

[28] Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 636.

to nature and strive to forget or disregard the technical rules and statements of doctrine in which we have been educated. As scholars, or as students of the history of jurisprudence, we may peruse with interest the erudite and brilliant essays of French, German, and Italian jurists, but as practical lawyers we may and should disregard all that wealth of learning, contemplating it only as something to be avoided, and as teaching the dangerous character of the similar artificial statements which we find in our own law books. To understand and apply correctly the doctrine of corporate personality, no other guide is desirable than sturdy common sense.[29]

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[29] Since the foregoing article was in type, an article entitled "Legal Personality" by Professor W. M. Geldart, an advocate of the reality theory, has appeared in 27 L. Q. Rev. 90. The last-mentioned article informs us that Sir Frederick Pollock has contributed to the recent Gierke Festschrift a discussion of the question, "Has the Common Law received the Fiction Theory of Corporations?" We may look forward to a discussion of the subject by such a master with great interest, not unmingled, however, with apprehension lest the entrance of such a champion into the lists may be the signal for the outbreak in the common-law world of a metaphysical contest similar to that which has absorbed so much attention upon the Continent of Europe.

THE DOCTRINE OF DUE PROCESS OF LAW BEFORE THE CIVIL WAR.

DURING the last court year the United States Supreme Court decided sixty-five constitutional cases; eight of these arose under the Obligation of Contracts clause, twenty-one under the Commerce clause, and twenty-four under the Fourteenth Amendment, or, more specifically, under that clause of the Fourteenth Amendment which declares that no state shall "deprive any person of life, liberty, or property without due process of law." [1] In other words, the most important clause of the United States Constitution judged as a restriction upon the legislative power of the states is the Due Process of Law clause of the Fourteenth Amendment. Equally interesting is the fact that this importance is comparatively recent. The Fourteenth Amendment was added to the Constitution in 1868. Between 1868 and 1889 seventy-one cases arose under the entire amendment. Between 1890 and 1901, on the other hand, 197 cases arose under the amendment, and that amounts to saying under the clause just quoted.[2] Again, while the American Digest for 1887 contains but 11 items upon Due Process of Law out of 274 items upon the subject of constitutional law, the same publication for 1902 contains 109 items upon Due Process of Law out of a total of 470 items upon constitutional law; and furthermore, a large proportion of the remainder of these 470 items are upon topics related to and growing out of the modern concept of Due Process of Law.[3]

Nor is the significance of these statistics difficult to discover when we understand what the modern concept Due Process of Law is. In the now famous case of Lochner *v.* State of New York [4] the issue was the validity of the statute limiting employment in bakeries to sixty hours a week and ten hours a day. Complainants in error

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[1] E. Wambaugh, Constitutional Law in 1909–10, 4 Am. Pol. Sci. Rev. 483–97.

[2] See the Annotated Constitution of the United States in any House or Senate Manual.

[3] Am. Dig. of dates mentioned, Tit. "Constitutional Law."

[4] 198 U. S. 45.

contended that this statute comprised an unreasonable and arbitrary regulation of an innocuous trade and was therefore not within the police power; and they propounded the following questions, which, they contended, the state must answer satisfactorily, in order to justify such an enactment as the one in question: "Does a danger exist which the enactment is designed to meet? Is it of sufficient magnitude? Does it concern the public? Does the proposed measure tend to remove it? Is the restraint or requirement in proportion to the danger? Is it possible to secure the objects sought without impairing essential rights and principles? Does the choice of a particular measure show that some other interest than safety or health was the actual motive of legislation?" The range of inquiry which the court is thus invited to enter into is obviously almost indefinite. Nevertheless it would seem from the language of Justice Peckham's opinion, pronouncing the statute under review void, that the court accepted the invitation. A salient passage of this opinion runs as follows:

"It must of course be conceded that there is a limit to the valid exercise of the police power by the state . . . otherwise the Fourteenth Amendment would have no efficacy in the legislatures, and the legislatures of the state would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid no matter how absolutely without foundation a claim might be. The claim of the police power would be a mere pretext, — become another and elusive name for the supreme sovereignty of the state, to be exercised free from constitutional restraint. . . . In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the federal court is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty?"

It is true that the decision in the Lochner case was rendered by a vote of five to four, but it would seem from a careful examination of their language that the dissenting judges were not protesting so much against the idea that due process of law means reasonable law, or, in other words, the court's opinion of reasonable law, as against the view that the statute before them was unreasonable.

I have elsewhere traced the development of the Due Process of Law clause of the Fourteenth Amendment.[5] That development, however, has a certain background in the history of our constitutional law anterior to the Civil War. My purpose in this paper is to show what that background is.

I.

The phrase "due process of law" comes from Chapter 3 of 28 Edw. III, which reads as follows:

"No man of what state or condition he be, shall be put out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without he be brought to answer by due process of law."

This statute in turn harks back to the famous Chapter 39 of *Magna Carta*, which the Massachusetts Constitution of 1780 paraphrases thus:

"No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land."[6]

The important phrase in this passage for our purposes is of course "by the law of the land," which is made by Sir Edward Coke in his Institutes synonymous with the later phrase, "by due process of law," and that in turn to signify "by due process of the common law," that is, "by the indictment or presentment of good and lawful men . . . or by writ original of the common law."[7] It must not be thought, however, that in writing thus Coke is recording the facts of history. Rather, to quote a recent authority upon *Magna Carta*, he was but "following his vicious method of assuming the existence in *Magna Carta* of a warrant for every legal principle established in his own day," a method which has enabled him to mislead utterly "several generations of commentators."[8] Among those thus misled are the three great commentators on American constitutional law, Kent, Story, and Cooley, — willing dupes no doubt, yet dupes none the less.[9]

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[5] 7 Mich. L. Rev. 642. [6] Declaration of Rights, Art. XII. [7] Inst. II, 50–1.

[8] McKechnie, *Magna Carta*, 447; *ibid.*, generally on "Chapter 39."

[9] 2 Kent, Comm., 2 ed., 13; Story, Comm., 4 ed., § 1789; Cooley, Const. Lim., 2 ed., 351 *et seq.*

It will not be amiss perhaps to raise the question whether Coke regarded "the law of the land," as he defined it, as beyond the power of parliamentary alteration, an inquiry which leads us to the great parliamentary inquest upon "the liberty of the subject" which, growing out of the arrest of the five knights, found ultimate fruition in the Petition of Right of 1628.[10] The question at issue at this time between Parliament and the King was whether the latter in ordering an arrest must assign a cause the validity of which it would accordingly devolve upon the judges finally to determine. The parliamentary lawyers, among whom was Coke, in support of their contention that such assignment of cause must be made, propounded the following argument: "And for the words '*per legem terrae*' original writs only are not intended, but all other legal process, which comprehended the whole proceedings of the law upon a cause other than trial by jury . . . and no man ought to be imprisoned by special command without indictment, or other due process to be made by the law." [11] The phrase "to be made by the law," taken in connection with the purpose of Parliament's protest, which was to keep "the regal power" "a legal power," seems plainly to leave Parliament itself unhampered.

There is, however, another phase of the matter which demands brief consideration. By "law of the land" Coke and his associates meant apparently merely such way of proceeding on the part of the monarch, when moving against individuals, as the law, whether ancient custom, the common law, or statute, ordained and established. But now the source of the guaranty that the monarch should thus proceed was *Magna Carta*. It therefore behooved the parliamentarians to exalt *Magna Carta* as much as possible, or, to quote Sir Benjamin Rudyard, to make "that good old decrepid law of *Magna Carta*, which hath been so long kept in and bed-ridden, as it were, . . . walk abroad again." [12] *Magna Carta* is accordingly pronounced the source of the fundamental rights of English subjects, is treated as irrepealable, and, finally, as incompatible with the notion of sovereignty anywhere in the realm: "*Magna Carta* is such

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[10] 2 Parliamentary History, especially cols. 262–362.

[11] *Ibid.*, cols. 263–4. See also "Mr. Attorney," at col. 306, with reference to a "precise statute"; also Littleton, at cols. 319–20; also same at col. 323.

[12] *Ibid.*, col. 335. In same connection, see Edward Jenks, "The Myth of *Magna Carta*," Independent Review, March, 1904.

a fellow that he will have no sovereign." [13] Years earlier than this, moreover, Coke himself had in Dr. Bonham's Case [14] declared specifically that the common law would on occasion control an act of Parliament if the latter were contrary to common right and reason, and adjudge it to be utterly void. From the general idea, however, of Parliament's power as limited by a fundamental law which had found embodiment in *Magna Carta* as a whole to the more definite proposition that it was limited by the "law of the land" clause of Chapter 39 was but a step; and it is interesting to note that that step was actually taken by some of Coke's contemporaries, to wit, in the case of Captain John Streater,[15] who, having been arrested by order of the Commonwealth Parliament, set up the contention in an application for a writ of *habeas corpus*, that such an order was not "law of the land." The argument was rejected by the court: "If the Parliament should do one thing and we the contrary here," said the judges, "things would run round. We must submit to the legislative power." But though rejected, Streater's argument, which is based almost exclusively upon passages drawn from Coke's various writings, serves to show what construction Coke's language is susceptible of when viewed from the proper angle.

II.

The early state constitutions did not contemplate judicial review, but they were considered none the less as setting certain limitations upon legislative power, the transgression of which by the legislature would destroy, to use an oft-quoted phrase from Vattel, "the basis of the legislature's own existence," [16] thus giving rise to the right of revolution on the part of the people. Did, then, the phrase "law of the land," which is the universal form in these constitutions, import any limitation upon legislative power? There are three good reasons for thinking not. In the first place, "the judgment of peers," signifying in our constitutional usage trial by jury, which is usually alternative to "law of the land" and therefore

[13] Parliamentary History, col. 357. For Pym's point of view, see McIlwain, High Court of Parliament, 83.

[14] 8 Rep. 118.

[15] 5 State Trials, 386 *et seq.*

[16] See Mass. Circular Letter of 1768, MacDonald, Documentary Source Book, 146–50.

apparently displaceable by it,[17] is often further safeguarded by a clause rendering it inviolable in all cases in which it had hitherto been used,[18] a clause to which the members of the legislature were sometimes required to take special oaths of fidelity.[19] In the second place, moreover, if "law of the land" meant something else than statutory enactment, that something could have been only the common law, which, however, is adopted in these same constitutions, when specific mention is made of it, only until the legislature may choose to alter it.[20] Finally, in the early days of judicial review, a number of cases arose in which the Law of the Land clause would certainly have been brought forward had it been deemed available as a constitutional restriction upon legislative power.[21] The argument from silence is often of dubious value, but in a case of this sort it is almost conclusive.

One of the two earliest constitutional cases under the Law of the Land clause arose in North Carolina in 1794,[22] in connection with the statute authorizing the Attorney-General of the State to take judgments against the receivers of public moneys upon motion and without notice to the delinquents. At first the opinion of the single judge sitting was adverse to the statute, but "next day at the sitting of the court, Haywood, Attorney-General, moved the subject again," contending that the clauses of the constitution that had been invoked were "declarations the people thought proper to make of their rights, not against a power they supposed their own

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[17] American Charters, Constitutions, and Organic Laws (F. N. Thorpe ed.), 569, 1687, 1891, 2455, 2473, 2788, 3277. See also, for existing provisions of this character, Cooley's Const. Lim. 351–3, note 1; and Frederick J. Stimson, Federal and State Constitutions, §§ 130–1.

[18] The original Maryland, New Hampshire, North Carolina, and South Carolina constitutions answer this description: American Charters, etc., *supra*, 1687 and 1688, 2455 and 2456, 2787 and 2788, 3277 and 3278; the Pennsylvania Constitution of 1776 is similar, p. 3083. See also *ibid.* 785, 2598, and 2637; Stimson, *supra*, § 72.

[19] This was the case in the original New Jersey Constitution, American Charters, etc., *supra*, 2598.

[20] The original Delaware, New Jersey, and New York constitutions contain this sort of provision. American Charters, etc., *supra*, 566, 2598, 2635. The absence of a similar provision from the other contemporary constitutions is acknowledgment that the power of sifting, continuing, or repealing the common law lay with the legislature. See also *ibid.* 680, 1713, 1742, 1780, 2613, 2649, 2655.

[21] Bayard *v.* Singleton, 1 Martin (N. C.) 42, 47 (1787); Bowman *v.* Middleton, 1 Bay (S. C.) 282 (1792); Van Horne *v.* Dorrance, 2 Dall. (U. S.) 309 (1795); Cooper *v.* Telfair, 4 Dall. (U. S.) 14 (1800).

[22] —— *v.* State, 2 Hayw. (N. C.) 29, 38.

representatives might usurp, but against oppression and usurpation in general." Historically, he argued, the term "law of the land" had a double significance: first, it was a protest on the part of those who drafted *Magna Carta* against the attempt of King John to introduce the civil law into England, and secondly, it was a protest against royal action "by a pretended prerogative against or without the authority of law." In the North Carolina constitution therefore the *lex terrae* signified simply "a law for the people of North Carolina, made or adopted by themselves by the intervention of their own legislature." After some hesitation two of the three judges accepted the Attorney-General's point of view.

The result arrived at by the North Carolina Superior Court in 1794 was reached independently by the New Hampshire Supreme Court nearly a quarter of a century later in Mayo *v.* Wilson,[23] in which a statute authorizing selectmen and tything-men to arrest persons suspected of traveling unnecessarily on the Sabbath was challenged upon the ground that under the Law of the Land clause of the State Constitution arrests could be made only by virtue of writs of duly constituted courts or warrants under the hand and seal of the magistrates. Said the court: "If this be the true construction of the constitution, the law in question is most clearly invalid, for it certainly purports to authorize an arrest without writ and without warrant from the magistrate." But is this the true construction? First, upon the basis of a review of Coke's and Sullivan's treatment of the same clause in *Magna Carta*, and secondly, upon the basis of an examination of the general principles upon which society is founded, the court comes to the opinion that "the fifteenth article in our Bill of Rights was not intended to abridge the power of the legislature, but to assert the right of every citizen to be secure from all arrests not warranted by the law," expressing "the will of the whole." It should be noted in passing that the entire objection to the New Hampshire statute was to the method of its enforcement and not at all to its substance.

But admitting the Law of the Land clause to limit the power of the legislature, when would it limit it? The context in which the clause is invariably found in the early state constitutions signifies that its reference is to procedure in the enforcement of penalties.[24]

[23] 1 N. H. 58.

[24] See references in note 17, *supra*. See also the opinion of the Attorney-General Rawlin of Barbadoes (1720?), Chalmer's Opinions, 373–82.

If therefore it limited the power of the legislature, it was when the legislature was delineating the process by which its measures, imposing penalties for their violation, were to be enforced. At this point the choice of the legislature would be restricted: it must select those methods of procedure which were known to "the law of the land." Such is the point of view of the South Carolina Supreme Court in the case of Zylstra *v.* Corporation of Charleston,[25] which was decided in 1794, the same year as the North Carolina case just reviewed. The plaintiff Zylstra had been arrested for violating a city ordinance which forbade the keeping of a tallow-chandler's shop within the corporation limits and, being subsequently convicted by the court of wardens without the intervention of a jury, had been fined £100. Again, it should be observed that plaintiff's objections are leveled not at all against the body of the ordinance in question, that is, against the prohibition enacted against the further pursuit of his livelihood within the city limits, but solely against the manner in which that prohibition was enforced. Even so, the court was hesitant to pass upon the constitutional issue, half of the bench basing their decision in favor of plaintiff upon the terms of the municipal charter. Waties, J., was more audacious, and construing the Law of the Land clause to consecrate the procedure known to the common law, pronounced the jurisdiction of the Court of Wardens unconstitutional. This view turned out, however, to be too stringent for any practical use, wherefore it was ultimately so far modified as to sanction the procedure that has been in existence at the time of the adoption of the state constitution,[26] — an illogical doctrine surely, since on the one hand it admits the necessity of legal development, but on the other hand cuts it short at a point which, from the standpoint of such necessity, is a perfectly arbitrary one.

"Law of the Land" and "Due Process of Law," however, derive their great contemporary importance not from their character as restrictions upon the power of the legislature in the enactment of procedure merely, but from their character as restrictions upon the power of legislation in general.[27] Not everything that is passed in

[25] 1 Bay (S. C.) 384.

[26] See particularly State *v.* Simons, 2 Spears 761 (1836); the definition there given on page 767 by O'Neill, J., anticipates Justice Curtis' definition in Murray *v.* Hoboken Land & Improvement Co., *infra*.

[27] Such use was originally suggested for the Trial by Jury and Due Compensation

the form of law is "law of the land," say the courts, not only with reference to enactments which have nothing to do with the subject of procedure, but even with reference to enactments sanctioned by methods of enforcement admittedly unexceptionable, as, for example, the statute involved in the Lochner case. How has this come about? The essential fact is quite plain, namely, a feeling on the part of judges that to leave the legislature free to pass arbitrary or harsh laws, so long as all the formalities be observed in enforcing such laws, were to yield the substance while contending for the shadow. But such a feeling is of course not in itself constitutional law: the question is, therefore, how did it become such? Before we can take up this question we have to dispose of some collateral matters.

The first great achievement of the courts in the interpretation of the written constitution was the establishment of judicial review; but that being done, the great problem toward the solution of which this same achievement is but the first contribution still remained, namely, the problem of the rightful limits of legislative power, particularly in dealing with property rights. During the Revolution and the years immediately following, the state legislatures had put through a number of reforms that had borne down upon various proprietary interests rather severely: the Northern legislatures had adopted measures looking to the gradual abolition of slavery within their respective jurisdictions; the Southern legislatures had abolished primogeniture; the reforming legislature of Virginia, after first disestablishing the Episcopal Church in that state, had twice reorganized it and had concluded, in 1801, by appropriating certain of its lands to the state.[28] Meantime, other exigencies than reform had, in the course of the years 1785–87, produced still more drastic legislation — "rag money" measures in a majority of the states and laws impairing the obligation of private contracts in still more;[29] so that when the Constitutional Convention met in Philadelphia in May, 1787, Madison attributed its convening less

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clauses; see Madison on Paper Money, November, 1786, Writings (Hunt) II, 280. Also see notes 82 and 107, *infra*.

[28] For a general account of this legislation see Fiske, Critical Period, 70–82. For a sketch of the Virginia Church Acts see Terret *v.* Taylor, 9 Cranch (U. S.) 43 (1815), 47–8.

[29] See Fiske, *supra*, 168–86; A. C. McLaughlin, Confederation and the Constitution, Ch. IX; 1 McMaster, History of the People of the United States, Ch. III.; Story, Comm., § 1371; Marshall in Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122.

to the necessity of remedying the deficiencies of the Articles of Confederation for national purposes than to the necessity of providing some effective security for private rights against legislative attack.[30] Finally, in virtue of notions inherited from Colonial days, which were further confirmed by the prevalent analogy between the state legislatures and the British Parliament, these bodies were prone, during the early years of our constitutional history, and some of them for years afterward, to all sorts of "special legislation" so called; that is, enactments setting aside judgments, suspending the general law for the benefit of individuals, interpreting the law for particular cases, and so on and so forth.[31] So long, of course, as there were Tories to attaint of treason this species of legislative activity had some excuse, but hardly was this necessity past than it came into great disrepute even with some of the best friends of democracy, by whom it was denounced not only as oppressive but as not properly within legislative power at all.[32]

But how was criticism upon legislative power converted into effective constitutional law? The answer is to be found in the doctrine of *vested rights*, which is the foundational doctrine of constitutional limitations in this country, and which in turn rests, not upon the written constitution, but upon the theory of fundamental and inalienable rights. Setting out with the definition of a vested right as a right which a particular individual has equitably acquired under the standing law to do certain acts or to possess and use certain things, the doctrine of vested rights regards any legislative enactment infringing such a right, whether by direct intent or incidentally, without making compensation to the individual affected, as inflicting a penalty *ex post facto*.[33] Article I, Section 10,

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[30] See Madison's long speech of June 6 in the Convention, in his Notes; also his letter of October 24, 1787, to Jefferson, giving an account of the Convention; also Federalist 44 (Lodge ed.).

[31] For examples note the following cases, cited *infra*, Calder *v.* Bull, Cooper *v.* Telfair, Holden *v.* James, Merrill *v.* Sherburne, Dash *v.* Van Kleek, Van Horne *v.* Dorrance's Lessee, Satterlee *v.* Matthewson, Norman *v.* Heist, and others referred to in footnotes.

[32] See Federalist, 48, quoting from Jefferson's notes on Virginia.

[33] The definition of a "vested right" is essentially that given by Chase, J., in Calder *v.* Bull, modified by Parker, C. J., in Foster *v.* Essex Bank, 16 Mass. 245 (1819), that there is no such thing as a "vested right to do wrong." Special legislative exemptions for which consideration is lacking should also be excepted from the definition. See Beers *v.* Ark, 20 How. (U. S.) 527 and cases cited. Also certain remedial statutes,

of the federal Constitution prohibits the states from passing *ex post facto* laws, and there is good evidence for believing that some of those who were instrumental in framing this provision intended it to forbid practically all sorts of retrospective laws.[34] In Calder *v.* Bull,[35] however, partly upon the strength of Blackstone's authority and partly for reasons of expediency, the Supreme Court ruled that the prohibition in question extended not to civil cases but to penal cases only. But now it is exactly the purport of the doctrine of vested rights to obliterate this very distinction between civil and penal legislation; and what is more paradoxical still, the first difficult step to this end was taken in the leading opinion in Calder *v.* Bull, that of Chase, J., who set forth in a *dictum* that must be regarded as stating the leavening principle of American constitutional law, the notion that legislative power, quite independently of the written constitution, is not absolute, but is constrained both by its own nature and by the principles of republican government, natural law, and the social compact. It is true that these views did not pass unchallenged, for Iredell, Chase's own associate, pronounced them those of a "speculative jurist," insisting that in a constitution which should contain no other provisions than those organizing the three branches of government, the legislative would be omnipotent. But, Iredell's disparaging tone to the contrary notwithstanding, Chase is to be regarded as foreshadowing the doctrine of Kent, Story, and, to some extent, that of Marshall, besides that of a host of lesser contemporaries, — in a word, the main trend of American constitutional decisions for a generation.

And indeed from the very moment, as Chase shortly afterwards testified without contradiction in Cooper *v.* Telfair,[36] state legislation began to be subjected generally to "new and more rigorous tests," which, a few years anterior, little of it that was of major importance could have survived. An excellent illustration is fur-

1 Kent, Comm. 455. In general, see T. M. Cooley in 12 Cent. L. Journ. 2–4: Cooley admits that the validity of legislation in this class of cases [retrospective laws] depends upon the view the court may take of its justice, and thinks this an unsatisfactory state of the law. Cooley follows the early cases largely. On the general subject see W. G. Meyer, Vested Rights, St. L. 1891. See also H. C. Black in 25 Am. L. Reg. N. S. 681 *et seq.*

[34] See Madison's Notes, under the dates of August 22 and 28; Dickinson's speech on the subject, August 29; Mason's, on September 14. Also see Federalist 44.

[35] 3 Dall. (U. S.) 386 (1798).

[36] 4 Dall. (U. S.) 14 (1800).

nished by the conversion of the Court of Appeals of Virginia, which between the years 1797 and 1802 advanced the doctrine of vested rights from a mere interpretative principle of general statutes [37] to a positive limitation upon legislative power and passed from giving, in the earlier of these years, the most sweeping possible application to the law forbidding entails [38] to the very verge of overturning the law disposing of the church lands, which was saved by the merest accident.[39] Another interesting illustration of the same character is afforded by the argument of the Supreme Court of Massachusetts in the case of Wales *v.* Stetson,[40] which gives the doctrine of vested rights the same effect as Marshall later gave the Obligation of Contract clause in the Dartmouth College case. This was in 1806. Eight years later the same court decided in Holden *v.* James [41] that notwithstanding the fact that the twentieth article of the state constitution contemplates a power inhering in the legislature to suspend the laws, such suspensions must be general, it being "manifestly contrary to the first principles of civil liberty, natural justice, and the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances." Five years later the New Hampshire Supreme Court laid down a similar doctrine upon the basis of the theory of the separation of powers, which had found clear and dogmatic expression in the New Hampshire Constitution of 1784.[42] Meanwhile, in 1811 the doctrine of vested rights was given its classic statement by Chancellor Kent in the famous case of Dash *v.* Van Kleek,[43] which was bottomed squarely upon Chase's *dictum* in Calder *v.* Bull.

But it is most important for our purposes to note the constrictive effect of the doctrine of vested rights, particularly in the New York courts, upon the large acknowledged powers of eminent domain and police regulation, and, contrariwise, its expansive effect in the

[37] See Elliott *v.* Lyell, 3 Call (Va.) 268 (1802), following Lord Mansfield in Couch *v.* Jeffries, 4 Burr. 2460 (1769).

[38] Carter *v.* Tyler, 1 Call (Va.) 165 (1797).

[39] Turpin *v.* Lacket, 6 Call (Va.) 113 (1802). The accident referred to was the death of Pendleton, J., the night before the day of the decision. Had he survived the court would have stood 3 to 2 against the statute.

[40] 2 Mass. 145. *Cf.* 1 Yeates (Pa.) 260 (1793). [41] 11 Mass. 396.

[42] Merrill *v.* Sherburne, 1 N. H. 204 (1819). Bill of Rights, Art. 37. See also Arts. 23 and 29.

[43] 7 Johns. (N. Y.) 498. See also 1 Comm. 455–6 and notes.

Supreme Court of the United States upon the prohibitions upon state power in the Constitution of the United States. The state had, it was always recognized, the power of eminent domain and also the power to regulate the use of property in the interest of the security, health, and comfort of its citizens,[44] that is to say, the police power, but to both these powers fundamental principles were now found to set very definite limits. Thus in Gardner *v.* Newburgh [45] Chancellor Kent ruled, upon the authority of Grotius, Puffendorf, and Bynkershoek,[46] and that of Blackstone, whom he quotes to the effect that in exercising the power of eminent domain the state is "an individual treating with an individual for an exchange," [47] that compensation was due the owner of property taken by the state even in the absence of any constitutional provision to that effect; furthermore that similar compensation was due one whose property, though not taken, was damaged by the state, and finally, by way of *dictum*, that the power of eminent domain is exercisable for "public purposes *only*." [48] The police power was similarly delimited. In the first place Kent was careful to point out that it did not extend to sumptuary legislation.[49] Again, by the followers of Kent, more zealous perhaps than their master, a distinction was drawn, upon the authority of Vattel, between regulation on the one hand, which was the true function of the police power, and on the other hand destruction, which lay without it.[50] True, the state could abate a nuisance, but only in those cases in which at the common law a private person, "taking the law into his own hands," could do so.[51] If it would go farther than this, the state could rely only upon its power of eminent domain and, by the doctrine of

[44] 2 Comm. 340.

[45] 2 Johns. Ch. (N. Y.) 162 (1819).

[46] See Grotius, De Jure Belli ac Pacis, Bk. 8, ch. 14, sec. 7; Puffendorf, De Jur. Nat. et Gent., Bk. 8, ch. 5, sec. 7; Bynkershoek, Quaest. Jur. Pub., Bk. 2, ch. 15.

[47] 1 Comm. 138.

[48] On this point see also 2 Kent, Comm. 339–40; also Varick *v.* Smith, 5 Paige (N. Y.) 146.

[49] 2 Comm. 328–30. For an instructive passage, setting forth Kent's point of view, see *ibid.* 325–6. Here Kent demurs to Blackstone's doctrine that the descent and transfer of property "are political institutions and creatures of municipal law, and not natural rights." See also *ibid.* 1.

[50] See particularly Attorney Griffin's argument in 7 Cowen (N. Y.) 592; the passage from Vattel is Bk. I, ch. 20, sec. 246.

[51] See also Justice Comstock's opinion in the Wynehamer case, reviewed below, and citations given. *Cf.* 2 Kent, Comm. 339–40.

consequential damages, must render adequate compensation for any valuable use abolished by its action.

Lastly, the doctrine of vested rights was infused by the Supreme Court into the Obligation of Contracts clause of the federal Constitution. The channel through which the doctrine was conducted to this use was furnished by the circuit courts, which in cases falling to the jurisdiction of the national judiciary because of diversity of citizenship stand in the place of the state courts and so have, from the outset, felt free to pass upon the constitutionality of state laws under the state constitution and such "general principles" as they have found those constitutions to recognize.[52] This is the explanation of such decisions as that of Patterson, J., in Van Horne *v.* Dorrance,[53] of Story in Society *v.* Wheeler,[54] and of the Supreme Court itself, speaking through Story, in Terret *v.* Taylor.[55] But the benefits of such decisions, after all, were not widespread. It was necessary, if the doctrine of vested rights was to do its full work, to enter the states themselves, and particularly was it necessary to extend the protection of the federal judiciary to legislative grants, whether of lands or charters, which, even in the states whose courts generally enforced the doctrine of vested rights, was sometimes left to the mercy of the legislatures; it being held, apparently, that what the legislature had given, the legislature could take away. In Fletcher *v.* Peck,[56] a case coming up from the circuit, Marshall achieves the deftest kind of blending of the doctrine of vested rights with the prohibition of the national Constitution of state laws impairing the obligation of contracts. In the Dartmouth College case,[57] which came up on a writ of error from a state supreme court, the same doctrine is upheld. The step was an easy one, and it was furthermore assisted by Webster's argument, a large part of which comprised Jeremiah Mason's earlier argument before the state court, invoking the doctrine of vested rights.[58] A decade

[52] See particularly Cushing, J., upon this point in Cooper *v.* Telfair; also Miller, J., in Loan Association *v.* Topeka, 20 Wall. (U. S.) 655 (1874), and Davidson *v.* New Orleans, 96 U. S. 97 (1877).

[53] 2 Dall. (U. S.) 309 (1795).

[54] 2 Gal. (U. S. C. Ct.) 103 (1814).

[55] 9 Cranch (U. S.) 43 (1815).

[56] 6 Cranch (U. S.) 87 (1810); see Justice Johnson's opinion in this case.

[57] 4 Wheat. (U. S.) 518 (1819).

[58] For Mason's argument and collateral matter of great interest, see Shirley, Dartmouth College Causes, in 2 So. L. Rev. N. S. 22 *et seq.* and 246 *et seq.* Webster significantly enough desired to bring the case up through the Circuit Court.

later, in 1829, Johnson, J., made an interesting confession of the motives that had guided the court in this, the most important, class of its decisions, throughout the period that was then drawing to a close. He writes:

"This court has had more than once to toil up hill in order to bring within the restriction of the states to pass laws violating the obligation of contracts, the most obvious cases to which the Constitution was intended to extend its protection; a difficulty which it is obvious might often be avoided by giving to the phrase *ex post facto* its original and natural application." [59]

The suggestion of Johnson, J., fell upon stony ground; but to-day it would be easy to imagine that the Supreme Court, in the interpretation that it began giving the Due Process of Law clause of the Fourteenth Amendment in 1890, had heard and heeded the warning of sixty years before.

But now for the purpose of this digression, which is twofold: first to indicate the point of view of the period during which the Law of the Land clause of the written constitution was first invoked as a protection of private rights against legislative power in general, and secondly, to point out that even where available, as, for example, it always was to the Massachusetts [60] and New York courts, it was not so invoked by the courts above mentioned, which instead contented themselves with drawing upon the principles of natural law and the social compact, at least so far as these principles render private property inviolate. But, of course, there had to be the notable exception to this general rule, for without it the Law of the Land clause would have had as short and inglorious a history as the initially much more promising provision respecting *ex post facto* laws.

III.

The exception was furnished by the Supreme Court of North Carolina. At first glance this circumstance appears remarkable

[59] Note appended to his concurring opinion in Satterlee *v.* Matthewson, 2 Pet. (U. S.) 380, 681 *et seq.* (1829).

[60] Marcy *v.* Clark, 17 Mass. 330 (1821), furnishes a good example of a case in which the phrase "law of the land" might have been used in the derived sense but is, as a matter of fact, used only in the narrow sense of procedure. In the same connection see also Rice *v.* Parkman, 16 Mass. 326.

in view of the attitude taken by that court in 1794, but upon a little investigation it is easily comprehended. In North Carolina, as in Pennsylvania, Rhode Island, and a number of the Western states, at the time judicial review was coming into general practice the creed of popular sovereignty was already in high favor;[61] accordingly it soon came to be understood in these states that judicial review rested not upon the doctrine of natural rights, its original foundation, but exclusively upon the written constitution, which was represented as an enactment of the sovereign people. But while in Pennsylvania and Rhode Island the courts, in consequence of the unavailability of such standards, felt themselves obliged to uphold all enactments of the legislature not transgressing some specific provision of the written constitution,[62] the Supreme Court of North Carolina, possessed of a more enterprising spirit, set about to discover some clause of the written instrument of sufficiently indefinite content, to accomplish the task that in Massachusetts, New York, and New Hampshire had fallen to doctrine drawn from abroad.

The pioneer case in North Carolina was that of the University of North Carolina *v.* Foy,[63] in which the constitutional issue was furnished by an act of the legislature of North Carolina repealing an earlier grant of lands to the university. In part the court rendered its decision in favor of the university upon the ground that that institution was erected in accordance with a mandate from the constitution itself and therefore stood on "higher grounds than any other aggregate corporation," but in part it relied upon the Law of the Land clause of the State bill of rights, which it found binding upon the legislature exclusively and which it defined to mean that no one should be deprived of his liberties or property without the intervention of a court of justice acting with a jury. The court says:

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[61] See 2 G. J. McRee, Life and Correspondence of James Iredell, 145–9, 169–76. Iredell's own later change of heart is shown by his opinion in Calder *v.* Bull, *supra.*

[62] Under C. J. Tilghman's leadership the Pennsylvania Supreme Court enforced the doctrine of vested rights, but under Gibson, C. J., rejected it for the doctrine of a plenary legislative power, save so far as limited by specific prohibitions of the written constitution. *Cf.* Bedford *v.* Shilling, 4 Serg. & R. (Pa.) 401 (1818), and Eakin *v.* Rauh, 12 Serg. & R. (Pa.) 330 (1825), with Watson *v.* Mercer, 1 Watts (Pa.) 330 (1833), and Menges *v.* Wertman, 1 Pa. St. 218 (1845), and note cases cited in the last case.

[63] 2 Hayw. (N. C.) 310 (1804).

"The property vested in the trustees must remain, therefore, for the uses intended for the university, until the judiciary of the country in the usual and common form pronounce them guilty of such acts as will in law amount to a forfeiture of their rights or a dissolution of their body."

University of North Carolina *v.* Foy is susceptible of two interpretations, a narrow one and a broad one. On the one hand emphasis may be laid upon the special character of the enactment overthrown and the decision classified accordingly with those reviewed above, in which the judges were endeavoring to rid legislative power of its element of prerogative by emphasizing the general character of legislation. This is the interpretation which Webster makes of the case in his argument in the Dartmouth College litigation, where he defines "law of the land" to mean the "general law," and prohibitive therefore of "acts of attainder, bills of pains and penalties . . . legislative judgments, degrees, and forfeitures." [64] A decade later Webster's language is in turn similarly interpreted by the Supreme Court of Tennessee, in the case of Van Zant *v.* Waddell,[65] in which the Law of the Land clause of the Tennessee constitution is defined to mean "a general public law equally binding upon every member of the community . . . under similar circumstances." In 1832 similar doctrine is voiced by the Supreme Court of South Carolina in the case of State *v.* Heyward,[66] where it supplements the doctrine of vested rights and the Obligation of Contracts clause of the Federal Constitution; and in 1838 the performance of the South Carolina court is exactly repeated by the Supreme Court of Maryland in the case of Regents *v.* Williams.[67] Finally, in 1843, Gibson, C. J., of Pennsylvania, who had begun his judicial career a firm believer in legislative sovereignty, — going even to the length of denying the doctrine of judicial review, — and who had always shown himself hostile to the doctrine of vested rights, was driven in Norman *v.* Heist,[68] in order to avoid too out-

[64] 4 Wheat. (U. S.) 575 *et seq.* See also *ibid.* 582, a question from Burke; Lache's second Treatise on Civil Government, § 142.

[65] 2 Yerg. (Tenn.) 260. See also *ibid.* 554; 10 Yerg. (Tenn.) 59.

[66] 3 Rich. (S. C.) 389.

[67] 9 Gill & J. (Md.) 362. The court cites University of North Carolina *v.* Foy. *Cf.* 7 Gill & J. (Md.) 191. In the latter case a special act of the legislature was overturned under the Sixth Article of the Bill of Rights, but no mention is made of the "law of the land" clause of the constitution.

[68] 5 W. & S. (Pa.) 171.

rageous consequences from a special act of the legislature, to avail himself, if only temporarily, of the Law of the Land clause of the Pennsylvania constitution, which he defined as signifying "undoubtedly a preëxistent rule of conduct, declaratory of a penalty for a prohibited act, not an *ex post facto* rescript or decree made for the occasion."

The broad interpretation of University of North Carolina *v.* Foy is to be had by disregarding the special character of the act under review and attending only to its operation upon private rights; that is, by identifying the doctrine of that decision with the general doctrine of vested rights, and so translating the Law of the Land provision into a prohibition of all retrospective legislation. In the case of Hoke *v.* Henderson,[69] moreover, decided in 1833, the Supreme Court of North Carolina itself puts exactly this interpretation upon its precedent. In that case the act in question was a statute which, in providing for the future election of court clerks, operated in some cases to displace previous incumbents by appointment. In behalf of the statute it was urged, first, that it was general in terms, "wanting in the precision and direct operation usually belonging to and distinguishing judicial proceedings," and secondly, that it was — ostensibly at least — enacted from the standpoint of the legislative view of the public interest and without any intention of passing sentence upon those detrimentally affected by it, who in fact were not charged with any delinquency: that the measure therefore was not a bill of pains and penalties and that any discussion of procedure was impertinent to the issue. Ruffing, C. J., was not much moved by these objections, but brushing them aside, proceeded to define "law of the land" to require that, before anyone shall be deprived of property, he shall have a judicial trial "according to the mode and usages of the common law" "and a decision upon the matter of rights as determined by the law under which it [the property] vested." The final clause of this definition is the notable part of it; for if it be taken literally it means that, with reference to any particular property right, the existent law is elevated to the position of a constitutional limitation upon the body which enacted it and can never be altered to the diminution of that right. Nor does the court apparently shrink from this result; for it says, it is true that "the whole community may modify the rights which persons

[69] 2 Dev. (N. C.) 1.

can have in things or at its pleasure abolish them altogether," but it hastens to add that the community speaks only through the constitution.

Some five years following Hoke *v.* Henderson occurred the Alabama case of *Ex parte* Dorsey,[70] which is notable for a number of reasons: First, because by the decision in it the doctrine of the Tennessee court in Van Zant *v.* Waddell is expanded, under color of warrant from the first article of the Alabama Bill of Rights, into a condemnation of legislation affecting detrimentally, not merely particular persons, but particular classes; secondly, because in the opinion of Ormond, J., the much more precise phrase "due course of law" is used as the equivalent of the phrase "law of the land"; and thirdly, because in the same opinion the term "property" in the Due Course of Law provision takes on a greatly expanded meaning, connoting not merely, like the phrase "vested rights," tangible property or specific franchises or remedies, but the general rights of an individual as a member of the community. The act under review in *Ex parte* Dorsey provided among other things that an attorney at law should be required, as a prerequisite condition to his practicing in the courts of the state, to take an oath asserting not only that he would not in the future participate in a duel in any capacity, but that he had not done so in the past. This rather harsh provision was placed by its defenders upon one or more of three grounds: first, that attorneys were public functionaries and that therefore the legislature has, under the constitution, the express right to prescribe their qualifications; secondly, upon the ground that it was penal legislation such as the constitution explicitly required the legislature to enact for the suppression of duelling; thirdly, upon the ground that the legislature had enacted it by virtue of its general power to provide for the moral welfare of the community. The point of view of the majority of the court in overturning the provision in question is indicated by its use of the final clause of the bill of rights, containing the usual *caveat* that enumeration of certain rights should not be construed to disparage other rights not so enumerated, in such a way as virtually to convert the constitution of the state into a grant of powers. They therefore insist upon treating the act under review — having swept aside the contention that attorneys are public functionaries — as a

[70] 7 Porter (Ala.) 293.

bill of pains and penalties, aimed at a particular class in the community. The measure is held, therefore, to fall under the condemnation of the first article of the bill of rights and the constitutional guaranty of a trial by jury, and by Ormond, J., who is sure that the right to practice law is "as deserving of protection as property," or at least is an element of the inalienable right to pursue happiness, under that of the "due course of law" clause. Collier, J., dissented, upon the ground that the state constitution is not a grant of powers but an organization of inherent powers, which accordingly are available to the legislature unless specifically withheld. The "due course of law" clause has therefore no independent force as a limitation upon the power of the legislature. It means such "forms of arrest, trial, and punishment" as are "guarantied by the Constitution, or provided by the common law, or else such as the legislature, in obedience to constitutional authority, have enacted to insure public peace or elevate public morals." Two years later we find Ormond, J., essentially disavowing his doctrine in this case and adopting that of his dissenting associate.

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[*To be continued.*]

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POLITICAL OFFENSES IN EXTRADITION. — Although some noted publicists have contended that nations are bound to extradite criminals by international law,[1] this view has not been taken by English-speaking countries.[2] Under our Constitution,[3] however, every state is obliged to surrender fugitives wanted for any crime by another state in the Union;[4] and most of the leading nations have bound themselves by reciprocal treaties to extradite persons wanted for a large number of specified crimes.[5] No treaties of the United States mention offenses of a political character, unless to exclude them.[6] England has excluded them by a general act of Parliament,[7] and it seems never to have been doubted that the law is the same in the absence of express exclusion.[8]

Although it would seem that there should be definite rules to determine what is a political offense, hardly more than a bare outline has been

[1] The authorities *pro* and *con*. are collected in WHEATON (DANA'S ED.), INTERNATIONAL LAW, § 115. Interesting instances of extradition, mostly of political fugitives, through specific negotiations, may be found in Tilghman, C. J.'s opinion in Commonwealth *v.* Deacon, 10 Serg. & R. (Pa.) 125, 128–130, and OPPENHEIM, INTERNATIONAL LAW, 389 *et seq.*

[2] For a summary of the authorities, see MOORE, EXTRADITION, §§ 16, 28.

[3] U. S. CONST., ART. IV, sec. 2, § 2.

[4] This includes political crimes. See Commonwealth *v.* Dennison, 24 How. (U. S.) 66, 100.

[5] For a list of the treaties of the United States, see 19 CYC. 53, note.

[6] See SPEAR, EXTRADITION, 48. A few treaties of Continental countries provide for extradition for political offenses. See CLARKE, EXTRADITION, 211, note; OPPENHEIM, INTERNATIONAL LAW, 400.

[7] 33 & 34 VICT. c. 52.

[8] A statement to this effect in a message by President Tyler to the Senate has been generally accepted. See MOORE, EXTRADITION, 303 note, 305.

developed. It is universally agreed that acts other than those which are crimes only because they menace the government are political offenses. Thus, extradition has been refused for offenses which, under ordinary circumstances, would be murder,[9] arson,[10] robbery,[11] and piracy.[12] Such crimes are, however, exempt from extradition only if committed in an attempt to get control of the government.[13] The crimes of an anarchist are usually not political, because he seeks to substitute no organized government for that which he attacks.[14] And the murder of a Russian constable by a revolutionist, to effect his escape, was recently held not to be a political crime. *Re Federenko*, 15 West. L. R. 369 (Manitoba, K. B., Oct. 18, 1910). The question of assassination of high government officials has received but little judicial consideration,[15] but jurists are unanimously of the opinion that it should not be given the dignity of a political offense.[16]

The law has justly been more lenient with acts done in an uprising of some size. As it is clear that no violence of any proportion or military disguise can be considered political if really not prompted by political motives, the courts have carefully investigated the *animus* of the expedition as a whole;[17] and a commission from a *de facto* or an assumed government,[18] or its authorization or subsequent ratification of the act,[19] is important only as a matter of evidence. But probably any act done in furtherance of a genuine insurrection, and directly connected with it, is exempt. It is immaterial whether the government which is asked to surrender the fugitive has recognized the fugitives' party as a government [20] or even as belligerents,[21] whether the end sought was a just one,[22] or whether the particular act was helpful in bringing about that end.[23] In theory, however, a murder prompted by ulterior motives would not be

[9] *In re* Castioni, [1891] 1 Q. B. 149; *In re* Ezeta, 62 Fed. 964.

[10] McKenzie's Case, cited 62 Fed. 1000.

[11] Case of the Mexican Revolutionists, cited 62 Fed. 1001; *In re* Young, a Canadian case reported in BENJAMIN, THE ST. ALBANS RAID.

[12] The Roanoke, CLARKE, EXTRADITION, 253.

[13] See *In re* Castioni, *supra*, 156.

[14] *In re* Meunier, [1894] 2 Q. B. 415.

[15] The only case found is that of Jacquin, MOORE, EXTRADITION, 309, in which the Chamber of Indictment at Brussels held it to be a political offense, in accord with the decision of the court of first instance, but against that of two intermediate courts.

[16] See, for example, MOORE, EXTRADITION, § 310 note; CLARKE, EXTRADITION, App. di, diii; 2 STEPHEN, HISTORY OF CRIMINAL LAW, 70; OPPENHEIM, INTERNATIONAL LAW, 398; LAWRENCE, INTERNATIONAL LAW, 238, where it is said, "Rulers should not be preserved like game for *battues* of excited enthusiasts." The treaties of the United States with Belgium and Luxemburg provide for the extradition of such assassins, and such a provision is usual in treaties between the Continental nations. See OPPENHEIM, INTERNATIONAL LAW, 394 *et seq.*

[17] See *In re* Tivnan, 5 B. & S. 645, 681, 696. THE CHESAPEAKE, THE CASE OF DAVID COLLINS *et al.*, 23.

[18] See *In re* Tivnan, *supra;* In Matter of Burley, 1 Local Courts & Municipal Gazette, Toronto 10 (affirmed 1 Can. L. J. N. S. 34); *In re* Young, *supra.* But see The Roanoke, *supra.*

[19] See In Matter of Burley, *supra; In re* Young, *supra.*

[20] Thus the Canadian courts held some acts authorized by the government of the Confederate States political and some not. See THE CHESAPEAKE, *supra;* In Matter of Burley, *supra; In re* Young, *supra.*

[21] In addition to the cases cited in note 20, see Case of McKenzie, *supra.*

[22] See especially Case of McKenzie, MOORE, EXTRADITION, 314, note.

[23] See especially *In re* Castioni, *supra*, 158.

political in its character merely because done in the course of a political rising,[24] any more than would a rape committed by a soldier in time of war. But in dealing with acts of violence directly connected in nature, time, and place with a real rebellion, judges have been reluctant to go into the question of motive, and have regarded it sufficient that it was incidental to the conflict.[25] There has, moreover, been little tendency to consider whether or not the act was a breach of the rules of war.[26] Publicists have suggested that this should be considered and that courts should be free to draw the line between acts abhorrent to common notions of law and morality and those reasonably demanded in warfare.[27] As the problem under discussion is the interpretation of a vague, general phrase in a treaty or statute, this suggestion is open to no legal objection. It is rather astounding to find that in all the cases in English-speaking countries where a fugitive has asserted that his crime had a political character, in only three [28] has the defense failed to prevail. The outcome of the principal case is consequently encouraging.

THE GRANDFATHER CLAUSE AND THE FIFTEENTH AMENDMENT. — The constitutions or statutes of several Southern states require an educational or property qualification for suffrage, but except from that requirement descendants of persons who were entitled to vote in any of the United States prior to some date before the adoption of the Fifteenth Amendment.[1] The words "on account of" in that amendment might logically be so construed as to make motive determine constitutionality. Judged by that standard, these Grandfather clauses would be bad, for they were enacted from a desire to disfranchise as many negroes and as few whites as possible.[2] On the same reasoning, Southern laws disfranchising for pauperism, non-payment of poll-tax,[3] conviction of chicken-stealing,[4] or even illiteracy, would be bad. The inconvenience of having the same statute unconstitutional if enacted at one time and place, and constitutional if enacted at another time and place, and the difficulty of deciding the motive for a law when its makers were actuated by various motives, seem fatal objections to this construction.[5]

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[24] See *In re* Castioni, *supra*, 164, 165.

[25] See *In re* Ezeta, *supra;* BENJAMIN, St. ALBANS RAID, 454, 455.

[26] See *In re* Ezeta, *supra*, 997, 1002; BENJAMIN, ST. ALBANS RAID, 458. But see In Matter of Burley, *supra*.

[27] See LAWRENCE, INTERNATIONAL LAW, 238; OPPENHEIM, INTERNATIONAL LAW, 395 *et seq.*, and Resolutions of the Institute of International Law, 1880 and 1892, WESTLAKE, INTERNATIONAL LAW, 246.

[28] These are *In re* Meunier, *supra* (anarchist); In Matter of Burley, *supra* (seizure of steamer by persons claiming to be Confederate officers); and the principal case. In the case of The Chesapeake, *supra*, the prisoners were discharged for technical reasons, but the offense (similar to that in In Matter of Burley) was not considered political.

[1] LA. CONST (1898), Art. 197, § 5 (son or grandson); N. C. CONST. (amended 1900), Art. VI, § 4 (lineal descendant).

[2] For some pertinent extracts from the debates in the Louisiana constitutional convention, see 13 HARV. L. REV. 279.

[3] See United States *v.* Reese, 92 U. S. 214.

[4] See KY. CONST. § 145; Diamond *v.* Commonwealth, 124 Ky. 418.

[5] See Williams *v.* Mississippi, 170 U. S. 213, 223.

Assuming the Fifteenth Amendment to be valid,[6] and its application to extend beyond Congressional elections,[7] the state law would be clearly unconstitutional if it expressly made race the test. Practically all white people and practically no negroes in Maryland come within the Grandfather clause. Accordingly that section of the Maryland suffrage statute is held to violate the Fifteenth Amendment. *Anderson* v. *Myers*, 182 Fed. 223 (Circ. Ct., D. Md., Oct. 28, 1910).[8] Nevertheless, a few descendants of free negroes come within the Grandfather clause and a few descendants of white immigrants do not. Laying stress on those facts, the Supreme Court of Oklahoma decided, two days before the federal decision, that a similar provision in the constitution of that state does not take away the right to vote on account of race or color. *Atwater* v. *Hassett*, 111 Pac. 802 (Okla.).[9] Probably no slave was ever entitled to vote in any of the United States.[10] The effect, therefore, of the clause is exactly the same as if it had imposed the stricter requirement upon any person of whom it is not true that he or some of his ancestors were free in this country before 1866, and upon certain other classes of persons. Stated so, it is obviously a discrimination on account of previous condition of servitude, unless the words of the amendment mean the "race, color, or previous condition of servitude" of the person so deprived. Even then, persons who were themselves slaves and who would otherwise have been entitled to vote before 1866 would have constitutional ground for complaint.[11]

This type of Grandfather clause is to be distinguished from that which excepts from the stricter requirements descendants of soldiers or sailors who served in any of the wars of the United States.[12] Whatever may be said of the validity of the latter under other sections of the Constitution, it seems open to no objection based on the Fifteenth Amendment.

DEBENTURE BONDS. — Debentures,[1] as direct charges upon the earnings of a corporation, are products of the industrial development of the

[6] For an ingenious argument against its validity, see 23 HARV. L. REV. 169.

[7] See *id.* 192.

[8] The U. S. Supreme Court has never passed on the validity of the Grandfather clauses. In Giles *v.* Harris, 189 U. S. 475, the plaintiff was not entitled to registration even if the scheme was unconstitutional. See 17 HARV. L. REV. 130.

[9] A possible ground for distinction is to be found in the difference of language used in the two provisions. The Maryland clause excepts "lawful" descendants, whereas the Oklahoma clause excepts "lineal" descendants. It is a fact so notorious that a court might well take judicial notice of it, that many negroes are lineal descendants of men entitled to vote before 1866, and but few of them are lawful descendants of such ancestors.

[10] This point was repeatedly insisted upon by Senator Pritchard arguing in behalf of his resolution to declare the Grandfather clause unconstitutional. The resolution was debated at length in the United States Senate in 1900, was referred, came out of committee a mere resolution to investigate, and expired with the session. 33 CONG. RECORD, *passim*.

[11] One of the plaintiffs in the federal case was born in 1834.

[12] ALA. CONST. (1901), § 180 (lawful descendants); VA. CONST. (1902), § 19 (son).

[1] The word "debenture" is used in at least eight different senses. It will be used here in the sense of a floating mortgage which charges with payment a company's "undertaking, including the good will of the business, and all its property and assets whatsoever and wheresoever, both present and future." Debentures are issued under the authority of four acts of Parliament, the principal ones being the Mortgage Debenture

nineteenth century. With the growth of great commercial undertakings it was soon perceived that the true value of their assets consisted in their earning capacity as a whole rather than in the value of their parts.[2] When it became necessary for them to raise sums of money to develop and improve their resources, it was found that their tangible property was wholly inadequate to float the required amount by mortgage. The English corporations, utilizing debentures, borrowed on their earning capacity directly;[3] but in this country money was raised by large stock issues.[4] Both courses were warranted by the economic conditions of the respective countries. In England debentures gave investors a higher rate of interest than mortgage bonds and a less fluctuating and more permanent form of investment than preferred stock.[5] But in such a rapidly developing country as ours the speculative attraction of stocks, coupled with a variety of other causes, contributed to make debentures unpopular.[6] True debentures are seldom found here, but not infrequently collateral and second mortgage bonds are so misnamed.

But the same considerations that make debentures admirable for large productive corporations whose true assets comprise so much more than their mere physical property, also govern to make them wholly unsuited, both economically and morally, for small concerns or individuals, where their issue could hardly be otherwise than in fraud of the general creditors.[7] This aspect of fraud coupled with the American rule of bankruptcy that intent to defraud creditors is not necessary to constitute a voidable preference has led to the condemnation of debentures as no more than "contracts to give preferences if they should become necessary."[8] But it is submitted that such criticism does not apply to corporate debenture bonds. A corporation's earnings are a definite fund periodically appropriated to the payment of its fixed charges. Hence, the situation created by the issue of corporate debentures is somewhat analogous to the mortgage of an annuity. Financially speaking, the corporation's earnings are just as truly the security behind an American mortgage bond as an English debenture.[9] Only the one reaches it indirectly by charging a lien upon some one asset, while the latter acts directly.[10]

Acts, 28 & 29 VICT. c. 78 and 33 & 34 VICT. c. 20, and the Companies Act, 45 & 46 VICT. c. 43, § 17. They constitute a charge upon the concern but must be registered to do so.

[2] It was the necessity for keeping such corporations going under all circumstances that led to the appointment of receivers with power to issue prior lien certificates. It may be noted that the United States Government registered bonds are in effect debentures. See COOK, CORPORATIONS, §§ 14, 777.

[3] Mortgage bonds, particularly among the railroads, were little used.

[4] The United States Steel Corporation is a typical example.

[5] "The English debenture expresses the real situation more clearly than the American bond." GREENE, CORPORATION FINANCE, 36. "Logically, therefore, the English custom is right and the American custom wrong." LOUGH, CORPORATION FINANCE, 141.

[6] On the reorganization of a company they were always ranked after the mortgage bonds and sometimes even with the general creditors. See, for example, the reorganization scheme of the Central Foundry Company of January 3, 1911.

[7] The issue of debentures by individuals is not provided for by the English acts. But to a limited extent they have become effective under the doctrine of Holroyd *v.* Marshall, 10 H. L. Cas. 191.

[8] See 19 HARV. L. REV. 557 *et seq.*

[9] See GREENE, CORPORATION FINANCE, 33.

[10] As a result of this indirect method it is not unusual for a single corporation to have

But does our legal system recognize a property right created purely by contract in matter not yet in existence? Such a right seems to be recognized by the Roman [11] and the German [12] laws. With the development of equity jurisdiction, property rights arising in and dependent upon executory contracts were gradually enforced. Succeeding generations saw this extended in many directions wherever mercantile convenience demanded it, while in many places such equitable property rights were extended to matter not yet in existence.[13] If, then, a debenture passes a true property right [14] in the earnings to be, it would be more than a contract to give a preference. Now although the English cases generally speak of a debenture as a "floating mortgage," "a charge upon the assets for the time being of a going concern," they substantially recognize that such definitions are self-contradictory and tacitly show that the earnings are what the debenture holder must look to. For they will not let him interfere with the management of the business,[15] or object to any sale,[16] lease, or mortgage [17] of the corporate property done in the course of business. And further a recent English case holds that he cannot, while the concern is running, prevent a garnishing creditor from going off with a specific asset.[18] *Evans* v. *Rival Granite Quarries*, [1910] 2 K. B. 974.

Labor Contract Laws and the Thirteenth Amendment. — Statutes in some states have made the breach of a contract to labor a crime.[1] These statutes have been attacked as obnoxious to the Thirteenth Amendment to the federal Constitution and the legislation thereunder,[2] on the ground that they keep the laborer in involuntary servitude for his master.[3] It is now clear that the Amendment applies to continuance in, as well as entry into, service, and performance of a contract may be in-

outstanding at the same time prior lien bonds, first and second mortgage bonds, equipment, collateral, terminal, and income bonds.

[11] See Salkowski, Roman Private Law, 484.

[12] See Schuster, Principles of German Law, 442 (*Sicherheits-hypothek*).

[13] "In truth although a sale or mortgage of property to be acquired in the future does not operate as an immediate alienation at law, it operates as the equitable assignment of the present possibility which changes into the equitable ownership as soon as the property is acquired by the vendor or the mortgagor." Pomeroy, Equity Jurisprudence, § 1288.

[14] Iowa, by statute, allows railroads to mortgage their future earnings. Jessup *v.* Bridge, 11 Ia. 572. The Georgia Code, § 1954, allows goods "in bulk, but changing in specific," such as a stock in trade, to be mortgaged. See also Sheffield Furnace Co. *v.* Witherow, 149 U. S. 574; Pennock *v.* Coe, 23 How. (U. S.) 117.

[15] *In re* Borax Co., [1901] 1 Ch. 326.

[16] *In re* Horne and Hellard, 29 Ch. Div. 736; Government Stock and Investment Co. *v.* Manila Ry. Co., [1897] A. C. 81; Biggerstaff *v.* Rowatt's Wharf, [1896] 2 Ch. 93.

[17] *In re* Hamilton's Windsor Iron Works, 12 Ch. Div. 707; Edward Nelson & Co. *v.* Faber & Co., [1903] 2 K. B. 367.

[18] *Accord*, Robson *v.* Smith, [1895] 2 Ch. 118; *In re* Roundwood Colliery Co., [1897] 1 Ch. 373. See also 55 Sol. J. 102, 121, 122.

[1] Rev. Stat. N. Car. (1908), § 3367; Cr. Code S. Car. (1902), § 357. For similar old English laws, see 1 Howell, Labor Legislation, 2 ed., 38.

[2] U. S. Rev. Stat., §§ 1990, 5526.

[3] Aside from constitutional objections to such punishment for breach, some contracts of personal service which tend toward slavery are invalid as against public policy. Parsons *v.* Trask, 7 Gray (Mass.) 473; Clark's Case, 1 Blackf. (Ind.) 122.

voluntary servitude.[4] But certainly some disagreeable results may be made to follow non-performance of a contract of personal service. The laborer for example is liable in damages for the breach. And equity sometimes prevents the "star," whose services are of peculiar value, from serving any one else.[5] A provision for fine or imprisonment in case of breach still leaves to the laborer the option to stop work, and only makes performance more desirable. It seems odd to say that the last step is prohibited by the Amendment because almost certain to accomplish what they all tend to bring about, namely, the performance of the contract. But the aim of the criminal law is through fear of punishment to prevent the happening of the act; the aim of the civil law is compensation to the person wronged. There is a corresponding difference in the effect upon the defendant of intimidation and persuasion. While the possibility of civil liability leaves a real option to break the contract, the fear of criminal punishment, like the fear of bodily injury, coerces the laborer into performance. Such statutes seem rightly held unconstitutional.[6]

A more common form of statute makes criminal any fraud in obtaining advancements on a contract of personal service,[7] usually accompanied by a provision that failure to repay or to perform shall be presumptive evidence of intent to defraud at the time the advancements were secured.[8] A state should be able to punish the obtaining of valuables by a false pretense of intention, even though the punishment tended to force the laborer to abide by a contract of personal service out of which the fraud grew,[9] and the legislature may provide that proof of one fact shall be *primâ facie* evidence of another.[10] But if there is no rational connection between the fact in issue and the acts on which the presumption is based, the rule of evidence works a disguised change in the substantive law and authorizes punishment for these latter acts alone. And on the ground that such a presumption permitted the breach of a labor contract to be punished as a crime the Supreme Court of the United States held an Alabama law invalid. *Bailey* v. *Alabama*, U. S. Sup. Ct., Jan. 3, 1911. If the broad rule of presumption is confined by construction to cases where warranted by the facts,[11] the statute should be upheld. But since it appeared that the presumption in the statute in the principal case might be applied to every breach of contract no matter how remote, the decision seems correct.

Since the Thirteenth Amendment does not destroy a state's police power,[12] the public interest in certain contracts should warrant it in

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[4] *Ex parte* Drayton, 153 Fed. 986. See Clyatt *v.* United States, 197 U. S. 207, 215, 216. But see Robertson *v.* Baldwin, 165 U. S. 275, 281.

[5] McCaull *v.* Braham, 16 Fed. 37; Duff *v.* Russell, 60 N. Y. Super. 80. In some cases equity has specifically enforced construction contracts, *e. g.*, contract to build a pipe line. But as these do not necessarily involve personal service, there was no "involuntary servitude." Grubb *v.* Starkey, 90 Va. 831; Gloe *v.* Chicago, etc. Ry., 65 Neb. 680.

[6] *Ex parte* Drayton, *supra; Ex parte* Hollman, 79 S. C. 9. *Contra*, State *v.* Murray, 116 La. 655.

[7] Laws of Me. (1907), ch. 7.

[8] Ga. Acts (1903), 90; Miss. Code (1906), § 1148; Rev. Laws, Minn. (1905), § 5187; Rev. Stat. N. Car. (1908), § 3431; Laws of N. Dak. (1907), ch. 208.

[9] See Peonage Cases, 123 Fed. 671, 690.

[10] Fong Yue Ting *v.* United States, 149 U. S. 698, 729.

[11] Mulkey *v.* State, 1 Ga. App. 521.

[12] See Barbier *v.* Connolly, 113 U. S. 27, 31.

making the breach of them criminal.[13] The contracts of sailors are so treated as being "historical exceptions," [14] and the public interest of to-day should be as potent as that of past ages out of which the exception grew. So statutes making criminal the abandonment of locomotives [15] seem constitutional. It is evident, however, that such legislation will be supported only in extreme instances, and there appears to be no such policy in favor of the statute in the principal case as to prevent its overthrow.[16]

PLURALITY OF VOTES CAST IN AN ELECTION FOR A DISQUALIFIED PERSON. — The rule is universal that if a plurality of votes in an election is cast for a person who is incapable of holding office, without notice to the electors of his disqualification, such votes may not be treated as nullities, but are effective to prevent the election of the candidate having the next highest number.[1] As to what notice will change such a result, the rule in England differs from that in this country. The present English law is that if the elector is chargeable with knowledge of the facts creating the disqualification, he is presumed to know the law, and his vote is thrown away.[2] And this is true even where it is doubtful whether the facts known do create a disqualification,[3] or where the notice given is not such as necessarily to command belief.[4] The English rule, however, had its origin in cases of elections in which the voting was *vivâ voce*, the number of voters small, and their knowledge of the candidates' qualifications easily ascertainable.[5] It is obviously ill-adapted to the conditions of manhood suffrage in this country and has been applied in only one [6] or possibly two [7] states. The most frequently quoted statement of our law is the following: "The existence of the fact which disqualifies, and of the law which makes that fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the elector, as that to give his vote therewith indicates an intent to waste it." [8]

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[13] *Cf.* Farnham *v.* Pierce, 141 Mass. 203; County of McLean *v.* Humphreys, 104 Ill. 378. See FREUND, POLICE POWER, § 452.

[14] Robertson *v.* Baldwin, *supra*. See 10 HARV. L. REV. 515; 13 *id.* 305.

[15] N. J. GEN. STAT. (1895), 2696; DEL. REV. CODE (1893), 928.

[16] For a discussion of a different sort of "peonage law," see 17 HARV. L. REV. 121.

[1] The King *v.* Bridge, 1 M. & S. 76; The Queen *v.* Hiorns, 7 A. & E. 960; Saunders *v.* Haynes, 13 Cal. 145; Commonwealth *ex rel.* McLaughlin *v.* Cluley, 56 Pa. St. 270.

[2] Trench *v.* Nolan, Ir. R. 6 C. L. 464. See Drinkwater *v.* Deakin, L. R. 9 C. P. 626.

[3] Beresford-Hope *v.* Lady Sandhurst, 23 Q. B. D. 79.

[4] Tavistock Case, 2 P. R. & D. El. Cas. 5; Cork County Case, K. & O. El. Cas. 391; in which the notice of the candidate's disqualification was circulated by his rival candidate. The cases of contested elections to Parliament, of which the two cases cited are examples, do not form, in all respects, a consistent body of law, but practically all of them seem to recognize this form of notice as sufficient and proper. Dissatisfaction with such a rule has, however, occasionally been expressed. Second Clitheroe Case, 2 P. R. & D. El. Cas. 276; Second Cheltenham Case, 1 P. R. & D. El. Cas. 224.

[5] The King *v.* Hawkins, 10 East 211; Rex *v.* Foxcroft, 2 Burr. 1017; Fife Case, 1 LUDERS, ELECTIONS, 455.

[6] Gulick *v.* New, 14 Ind. 93; State *ex rel.* Clawson *v.* Bell, 169 Ind. 61; the latter of which qualifies other Indiana cases which contained language making notice of the disqualification unnecessary.

[7] Hatcheson *v.* Tilden, 4 Har. & McH. (Md.) 279; an early *nisi prius* decision.

[8] People *ex rel.* Furman *v.* Clute, 50 N. Y. 451. This decision is clearly the law in

A recent case held the next highest candidate elected where a plurality of the votes was cast for a man who was known by most of the voters to have died ten days before the election, but under the belief, induced by reports widely circulated, that if his name secured a plurality, a vacancy would be created which could be filled by another man of his political beliefs. *State ex rel. Bancroft* v. *Frear*, 128 N. W. 1068 (Wis.). The case thus raises the question whether, in the rule as above quoted, the essential feature is the knowledge by the elector of facts known to disqualify, or the attitude of the elector in acting "so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise." [9] Here the former element was present, but the latter lacking. And it would seem that the latter is the essential feature. It has been held, though the question has been seldom raised, that courts cannot presume a willingness to waste a vote from the mere fact that the voter had notice that his candidate was dead [10] or ineligible.[11] And it is contrary to republican principles that a man should be declared elected whom a plurality of the electors have refused to endorse. Probably, the action of the plurality must be one of affirmative choice and not merely of dissent, and it might well be conceded that if the disapproval of the qualified candidate were expressed by votes for "a stick or a stone or for 'the man in the moon,'" as suggested by the opinion in the principal case, such disapproval would not be effective to prevent his election. But in the principal case a plurality of the voters, by reasonable, concerted action, did indicate an affirmative choice, either for the dead man or for a man of his political beliefs. It would seem a fairer decision, as more expressive of the will of the voters, that, when the vacancy could not be filled as expected, there had been no election.

Equitable Relief for Mistake of Law. — Considerable uncertainty as to the scope of the jurisdiction of equity to give relief because of mistake, has arisen from a misapplication of the maxim that ignorance of the law excuses no one. Although several earlier decisions had denied its applicability to suits in equity,[1] Lord Ellenborough made it the basis of a decision against the recovery of payments made under a mistake of law, on an insurance policy.[2] Since then it has often been stated as a general rule that mistake, in order to be a ground for equitable relief, must be of fact and not of law; [3] but this rule has many exceptions. Thus

this country. Barnum *v.* Gilman, 27 Minn. 466; Gill *v.* Mayor and Aldermen of Pawtucket, 18 R. I. 281.

[9] People *ex rel.* Furman *v.* Clute, *supra.*

[10] State *ex rel.* Herget *v.* Walsh, 7 Mo. App. 142.

[11] Ransom *v.* Abbott, Taft, Senate Election Cases, 338; a case of disqualification under the Fourteenth Amendment, in which both the disqualifying fact and the law affecting it must have been well known to most of those voting. One ground for the decision was that there was a chance that one so disqualified might have his disabilities removed. See Barnum *v.* Gilman, *supra.*

[1] Lansdowne *v.* Lansdowne, 2 Jac. & W. 205; Simpson *v.* Vaughan, 2 Atk. 30.

[2] Bilbie *v.* Lumley, 2 East, 469.

[3] Bentley *v.* Whittemore, 18 N. J. Eq. 366; Fowler *v.* Black, 136 Ill. 363; Clapp *v.* Hoffman, 159 Pa. St. 531. See Hunt *v.* Rousmaniere, 8 Wheat. (U. S.) 174, 1 Pet. (U. S.) 1; 2 Pomeroy, Equity Jurisprudence, § 842; 1 Story, Equity Jurisprudence, § 111 *et seq.*

a mistake of foreign law is considered a mistake of fact.[4] When public moneys are paid under a mistake of law, they may be recovered; [5] and an officer of the court may not retain a payment made to him under a mistake of law.[6] Also, whenever mistake of law is combined with inequitable conduct by one party, including fraud,[7] or unfair use of superior knowledge,[8] equity will relieve the other.

Especially in the matter of reformation, the general rule has been relaxed. The process has involved much refinement of reasoning, particularly regarding different kinds of mistakes of law, mistake as to a party's existing legal rights generally being considered a sufficient ground for equitable relief.[9] Reformation is nearly always allowed when, in reducing a contract to writing, there has been a mistake in the use of words with a technical legal meaning.[10] The distinction, if any, between such a case and one where the parties are mistaken as to the legal effect of a writing which they agree on as representing their oral contract, though sometimes taken,[11] is too subtle, and has often been repudiated.[12] Thus, where the parties, intending to effect a mortgage, and in ignorance of a statute requiring the fact that a conveyance is only for security to appear on the deed, made an absolute deed and a separate contract for reconveyance on payment of the debt, reformation was allowed. *Forest Lake State Bank* v. *Ekstrand*, 128 N. W. 455 (Minn.). An examination of the decisions which have held mistake of law not to be a sufficient ground for reformation, is also instructive. In many, if not most of them, it is submitted that reformation would have been improper even if the mistake had been one of fact, though the true ground for the decision is not always given. Reformation has been refused where there was no clear proof of a former contract which the writing was intended to set forth, and to which it could be conformed; [13] and even if there were such a contract, if reformation would have caused an inequitable situation due to the intervention of a *bonâ fide* purchaser, or a change in the position of one of the parties.[14] In the absence of inequitable conduct by the other party, a mistake of law by one only has been held not to justify reformation,[15] and even if mutual, the mistake must have been material.[16] In

[4] Sampson *v.* Mudge, 13 Fed. 260.

[5] Wisconsin Central R. R. *v.* United States, 164 U. S. 190, 210; Allegheny County *v.* Grier, 179 Pa. St. 639.

[6] *Ex parte* James, L. R. 9 Ch. 609.

[7] Welles *v.* Yates, 44 N. Y. 525.

[8] Chelsea Nat. Bank *v.* Smith, 74 N. J. Eq. 275; Lyon *v.* Tallamadge, 14 Johns. (N. Y.) 501.

[9] Cooper *v.* Phibbs, L. R. 2 H. L. 149, 170; Marshall *v.* Lane, 27 D. C. App. 276. See 2 POMEROY, EQUITY JURISPRUDENCE, § 849.

[10] Pitcher *v.* Hennessey, 48 N. Y. 415; Lockwood *v.* Geier, 98 Minn. 317; Ryder *v.* Ryder, 19 R. I. 188. *Contra*, Atherton *v.* Roche, 192 Ill. 252.

[11] See Canedy *v.* Marcy, 13 Gray (Mass.) 373; Radebaugh *v.* Scanlon, 41 Ind. App. 109.

[12] Griswold *v.* Hazard, 141 U. S. 260; Wyche *v.* Greene, 16 Ga. 49. See 1 STORY, EQUITY JURISPRUDENCE, 11 ed., § 130, note.

[13] See Marshall *v.* Westrope, 98 Ia. 324; Kent *v.* Manchester, 29 Barb. (N. Y.) 595. This seems to be the explanation of the decision in the leading case of Hunt *v.* Rousmaniere, *supra*.

[14] Van Houten *v.* Van Houten, 68 N. J. Eq. 358; Jeakins *v.* Frazier, 64 Kan. 267; Nichols *v.* Leeson, 3 Atk. 573.

[15] Eldridge *v.* Dexter & P. R. R. Co., 88 Me. 191.

[16] Powell *v.* Smith, L. R. 14 Eq. 85, 90.

many cases, the written contract was a compromise of disputed claims, with which a court of equity would be slow to interfere.[17] All these decisions merely represent rules which are equally controlling when reformation is sought for mistake of fact.[18]

It appears, therefore, that in practice the courts make but a slight distinction between mistakes of law and of fact as grounds for reformation and other equitable relief. It is submitted that there really is no distinction, and that the rule against granting relief for mistake of law, emasculated as it is by many exceptions, should be entirely discarded.[19]

RIGHTS OF ACTION FOR INJURY TO THE PROPERTY OF A BANKRUPT. — The present Bankruptcy Act provides that "the trustee of the estate of a bankrupt . . . shall . . . be vested . . . with . . . rights of action arising . . . from . . . injury to his property." [1] A recent case holds that this section vests in the trustee a right of action for fraud inducing the bankrupt to buy property at a price greater than its value. *In re Gay*, 182 Fed. 260 (Dist. Ct., D. Mass.).

An early state decision held that an action for fraud on the bankrupt in the sale of goods was not vested in his assignee as a "debt due to the bankrupt." [2] The Bankruptcy Act of 1867 contained the same provision as the present act with regard to actions for injury to the bankrupt's property.[3] But under it, by the weight of authority, a right of action for fraud causing damage to property was held not to pass to the assignee.[4] In England, however, the trustee is vested with a right of action for false representations, where the damage has been to the estate of the bankrupt.[5] The only previous decision under the present federal statute agrees with the English rule and with the principal case.[6]

The course of judicial opinion as to rights of action for the abuse of legal process to the damage of the bankrupt's property affords a parallel to that of the decisions on actions for fraud. Under the early state laws a right of action for malicious attachment,[7] wrongful execution,[8] or excessive distress [9] did not vest in the assignee. Under the Act of 1867 an action for the malicious abuse of garnishment proceedings, to the dam-

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[17] See Pullen *v.* Ready, 2 Atk. 587; Gibbons *v.* Caunt, 4 Ves. 839.

[18] See 23 HARV. L. REV. 608–626.

[19] See Cooper *v.* Phibbs, *supra;* Bonbright *v.* Bonbright, 123 Ia. 305; Biggs *v.* Bailey, 49 W. Va. 188; Wisconsin Marine & Fire Ins. Co. Bank *v.* Mann, 100 Wis. 596; Richmond *v.* Ogden Street Ry. Co., 44 Or. 48; Wyche *v.* Greene, *supra;* Daniell *v.* Sinclair, 6 App. Cas. 181, 190.

[1] BANKRUPTCY ACT, 1898, § 70 *a* (6).

[2] Shoemaker *v.* Keely, 2 Dall. (Pa.) 213.

[3] BANKRUPTCY ACT, 1867, § 14.

[4] In the Matter of Crockett, 2 Ben. (U. S.) 514; *In re* Brick, 4 Fed. 804; Tufts *v.* Matthews, 10 Fed. 609. *Contra*, Hyde *v.* Tuffts, 45 N. Y. Super. Ct. 56. *Cf.* Byxbie *v.* Wood, 24 N. Y. 607.

[5] Hodgson *v.* Sidney, L. R. 1 Ex. 313; Warder *v.* Saunders, 10 Q. B. D. 114. *Cf.* Twycross *v.* Grant, 4 C. P. D. 40.

[6] *In re* Harper, 175 Fed. 412.

[7] Stanly *v.* Duhurst, 2 Root (Conn.) 52.

[8] Sommer *v.* Wilt, 4 Serg. & R. (Pa.) 19.

[9] O'Donnel *v.* Seybert, 13 Serg. & R. (Pa.) 54.

age of the bankrupt's business, was held not to pass.[10] The English courts, on the other hand, have held that an action on the case by an undertenant against his lessor for a breach of duty causing a distress by the superior landlord[11] and an action for maliciously maintaining the bankruptcy proceedings[12] vest in the trustee. And a well-considered case under the present federal act decides that an action for malicious attachment, where the damage is to the property of the bankrupt, may be maintained only by the trustee.[13]

Not only on the wording of the statute but on general principles of bankruptcy law, the later decisions seem correct. The debtor alone should sue for an injury to his personal rights. But when the direct effect of a tortious act is to diminish the estate to which his creditors are entitled to have recourse, the right of action therefor should pass to his trustee in bankruptcy. Except for the earlier American cases referred to, this principle is fully borne out by statutes and decisions. Thus, a right of action for conversion passes to the trustee.[14] One for trespass to personalty passes where the damage is to the property of the bankrupt.[15] But an action which is in form one for the infringement of a property right will not pass, if the real damage is of a personal nature, as an action for loss of services for the seduction of a member of the bankrupt's family,[16] or an action for trespass in his dwelling-house.[17] Where negligence of an attorney causes the bankrupt's imprisonment, the right of action does not pass to the trustee.[18] But it is otherwise where the attorney's negligence or fraud causes damage to the bankrupt's estate.[19] The federal courts have recognized the true distinction in decisions under both the Act of 1867 and the present act that a right of action for a penalty passes to the trustee in bankruptcy if it arises from a transaction from which the bankrupt's estate suffered.[20]

WHETHER DAMAGE TO CONTRACT RIGHT BY NEGLIGENT ACT OF THIRD PARTY IS ACTIONABLE TORT. — That the existence of a contract between two parties, in addition to giving a right *in personam*, also gives a right *in rem*[1] which the law protects from infringement has been established

[10] Noonan *v.* Orton, 34 Wis. 259.
[11] Hancock *v.* Caffyn, 8 Bing. 358.
[12] Metropolitan Bank *v.* Pooley, 10 A. C. 210.
[13] Hansen Mercantile Co. *v.* Wyman, Partridge & Co., 105 Minn. 491.
[14] Ouchterlony *v.* Gibson, 5 M. & G. 579; Lovell *v.* Hammond Co., 66 Conn. 500.
[15] See North *v.* Turner, 9 Serg. & R. (Pa.) 244, 249.
[16] Howard *v.* Crowther, 8 M. & W. 601.
[17] Rogers *v.* Spence, 13 M. & W. 571. So, also, in England, an action for trespass to personalty, where the damage consists solely or principally in personal annoyance. Brewer *v.* Dew, 11 M. & W. 625; Rose *v.* Buckett, [1901] 2 K. B. 449. But under our statute it would seem such a right of action must pass to the trustee, under the provision as to rights of action "for the unlawful taking" of the bankrupt's property. BANKRUPTCY ACT, 1898, § 70 *a* (6).
[18] Wetherell *v.* Julius, 10 C. B. 267.
[19] Wetherell *v.* Julius, *supra;* Crauford *v.* Cinnamond, Ir. R. 1 C. L. 325; *Re* Daines, 16 L. T. Rep. N. S. 127; Morgan *v.* Steble, L. R. 7 Q. B. 611.
[20] Wright *v.* First National Bank, 8 Biss. (U. S.) 243; First National Bank *v.* Lasater, 196 U. S. 115.

[1] See PIGGOTT, TORTS, 368.

by the English cases[2] and the great weight of authority in this country.[3] Whether every interference with this newly recognized right amounts to a tort, if it fulfils the conditions applicable to all other cases of torts, would seem worthy of inquiry.[4] In a recent English case, a tug was towing a ship under a contract from one port to another, when the defendant's vessel negligently collided with the ship in tow causing it to sink almost before the tug could cast loose.[5] No recovery was allowed for the loss of rights under the contract. *La Société Anonyme de Remorquage à Hélice* v. *Bennetts*, 27 T. L. R. 77 (Eng., K. B. Div., Nov. 8, 1910).

Yet if the strain of the collision had ripped up the deck planks of the tug, the owners could certainly have recovered from the neglig nt vessel. We therefore have the situation that though there would be a duty to use care not to injure the property of the plaintiff in the planking of the tug, there was no such duty not to injure the property of the plaintiff in the contract.[6] There is no doubt that the defendant's negligent act caused the damage. And it will readily be granted that if the defendant in this case had sunk the tow with the intention of destroying the plaintiffs' rights under the contract, an action would be maintainable.[7] The sole ground of distinction, therefore, between these two sets of facts, upon which recovery was refused in one case and would be allowed in the other, is that involving the element of responsibility,[8] *i. e.* the standard by which the defendant's acts are measured. This distinction seems unreal.

The general purpose of the law of torts is to secure indemnity to the individual who has been damaged in some right which the law recognizes should be protected, not to punish the defendant.[9] It would seem on principle that the standard of conduct which the law calls blameworthy,[10] in one who has caused damage, is, and ought to be, an external standard;[11] that, with the possible exception of those cases of so-called absolute liability,[12] that standard is measured[13] by what the conduct of a reasonably prudent man under similar circumstances would have been; and that when these two elements occur, namely, (1) damage to a right the law recognizes, caused by (2) a defendant who has failed to act up to that external standard, there is a *primâ facie* tort. It seems undesirable,

[2] Lumley *v.* Gye, 2 E. & B. 216; Temperton *v.* Russell, [1893] 1 Q. B. 715.

[3] *Accord*, Walker *v.* Cronin, 107 Mass. 555; Jones *v*, Stanly, 76 N. C. 355; Angle *v.* Chicago, etc. Ry. Co., 151 U. S. 1. *Contra*, Boyson *v.* Thorn, 98 Cal. 578; Chambers *v.* Baldwin, 91 Ky. 121; Glencoe Land, etc. Co. *v.* Hudson Bros. Commission Co., 138 Mo. 439.

[4] See PIGGOTT, TORTS, 362–368; 1 HARV. L. REV. 9–10; Raymond *v.* Yarrington, 96 Tex. 443, 451.

[5] It would not seem to be too violent an inference from the facts that the defendant knew or ought to have known that a contract for towing existed. The above analysis of the case assumes that fact, for of course if this were not so, there would be no question of negligence toward the contract right.

[6] *Accord*, Cattle *v.* Stockton Waterworks, L. R. 10 Q. B. 453.

[7] See POLLOCK, TORTS, 5 ed., 521.

[8] See 8 HARV. L. REV., 200 *et seq.*

[9] See HOLMES, COMMON LAW, 144.

[10] See *id.* 96, 107.

[11] See *id.* 110; 8 HARV. L. REV. 1.

[12] But see HOLMES, COMMON LAW, 116–117, 119, 150, 152.

[13] See *id.* 108.

in view of the general purpose of the law, to inquire into the mental attitude of the defendant in fixing a *primâ facie* liability.[14] And it is submitted that in those cases where the mental attitude of the defendant is the determining factor in fixing the ultimate liability, that factor has been considered under the further problem of what may technically be called "justification," which is determined by various considerations of public policy.[15] There can be no question of justification in the case under discussion.

Apparent and perhaps real exceptions to the principles thus briefly laid down may occur. The law has grown by slow stages, and it would be strange if it presented a uniformly logical system of principles. But this would seem the proper analysis upon which to base any future development of the law of torts.[16] Nor is lack of precise precedent [17] an argument of much weight [18] in the class of cases to which the principal case belongs.[19]

RECENT CASES.

ALIENS — NATURALIZATION ACT — PROOF OF RESIDENCE BY SUPPLEMENTARY AFFIDAVITS. — The Naturalization Act of June 29, 1906, provides that the petition of an applicant for naturalization "shall also be verified by the affidavits of at least two credible witnesses . . . who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously." The affidavits of two witnesses stated that they had personally seen the petitioner from 1904 to July, 1905. These were supplemented by the affidavits of three other witnesses who had known the petitioner four years and ten months immediately preceding the date of filing the petition. *Held*, that the requirement of the statute is satisfied. *In re Godlover*, 181 Fed. 731 (Circ. Ct., N. D. Cal.).

The former act merely provided that the five years' residence "shall be made to appear to the satisfaction of the court." U. S. REV. STAT., 1878, § 2165. The present act specifically requires the testimony of at least two witnesses. 34 U. S. STAT. AT L. 596, 598. The provision regarding affidavits is additional. The obvious purpose of these and other sections is to prevent the naturalization of aliens who have lived in this country for a lesser period than five continuous years preceding the date of the petition. And the purpose is accomplished by this construction. The language is not wholly unambiguous, and the construction put upon it in the principal case is sensible and just. Moreover, statutes regarding the rights of citizenship should be construed liberally. *In re Polsson*, 159 Fed. 283.

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[14] See *id.* 107, 130.

[15] A clear illustration can be taken from the law of defamation in respect to the defenses of truth and privilege absolute and conditional. This seems also the proper analysis of cases arising from labor and trade disputes.

[16] See the dissenting opinion of Holmes, J., in Vegelahn *v.* Guntner, 167 Mass. 92, 105–109, the dissenting opinion in Payne *v.* R. R., 13 Lea (Tenn.) 507, 528; 20 HARV. L. REV. 253.

[17] This precise point was raised and left undecided in McNary *v.* Chamberlain, 34 Conn. 384.

[18] See 14 HARV. L. REV. 193.

[19] For a full and clear analysis of the whole subject, see HOLMES, COMMON LAW, Lectures 3 and 4; 8 HARV. L. REV. 377–395.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — RIGHT OF ACTION FOR FRAUD CAUSING DAMAGE TO PROPERTY. — The plaintiff in an action of tort for fraudulent representations inducing him to buy bonds at prices greater than their value was adjudicated a bankrupt. *Held*, that the right of action passed to the trustee in bankruptcy. *In re Gay*, 182 Fed. 260 (Dist. Ct., D. Mass.). See NOTES, p. 396.

BILLS AND NOTES — CERTAINTY OF AMOUNT — MARGINAL FIGURES. — A made a note with no sum named in the body, but with the figures £50 in the upper left-hand corner. *Held*, that this is a valid promissory note for fifty pounds. *Heeney* v. *Addy*, [1910] 2 I. R. 688.

From the irregular form of the note it is doubtful whether any blank for the amount was left in the body of it. If not, it seems easy to say that the figures are intended to be the sole expression of the amount, and that there is a clear promise to pay that sum. *Hubert* v. *Grady*, 59 Tex. 502; *Strickland* v. *Holbrooke*, 75 Cal. 268. If a blank has been left there is an omission of an essential part of the note, and the marginal figures are allowed to supply it. Some jurisdictions in the United States allow this. *Wittey* v. *Michigan Mutual Life Insurance Co.*, 24 N. E. 141 (Ind.); *Ives* v. *The Farmers' Bank*, 84 Mass. 236. Others do not. *Norwich Bank* v. *Hyde*, 13 Conn. 279; *Hollen* v. *Davis*, 59 Ia. 444. The plaintiff could undoubtedly fill in for the fifty pounds, and recover. See BRANNAN, NEG. INST. LAW, § 14; *Chestnut* v. *Chestnut*, 104 Va. 539. And even if he filled in a greater amount a *bonâ fide* purchaser from him could recover for that. *Garrard* v. *Lewis*, 10 Q. B. D. 30. The note is practically drawn in blank as to the sum payable, and if the plaintiff is willing to accept the marginal figures as such there is nothing to be gained by insisting that he write in the amount.

BILLS AND NOTES — INDORSEMENT — INDORSEMENT UNDER ASSUMED NAME. — The defendant received a letter purporting to be from A, requesting a discount on certain vouchers. The letter was in fact written by B and the vouchers forged. The defendant, however, made out the check to A and sent it to the address given. It was received by B, indorsed by him in A's name, and cashed at the plaintiff bank. *Held*, that the bank is not liable. *Mercantile National Bank* v. *Silverman*, 44 N. Y. L. J. 1449 (N. Y., Sup. Ct.).

In a transaction by letter, where one party is intending to transfer title and the other is acting under an assumed name, the transferor has in fact two intentions, one to pass title to the writer of the letter and the other to pass title to the person who bears the name assumed. That he is not conscious of the composite nature of his intent does not alter the facts of the case. The primary intent, however, seems to be to pass title to the person whose name is assumed; for the transferor had no suspicion of the fraud, and made the advance on the strength of the name. *Cunday* v. *Lindsay*, 3 App. Cas. 459. If this is true, the impostor had no title to the check and could not indorse it to the bank. *Palm* v. *Watt*, 7 Hun (N. Y.) 317. It may be, however, that the defendant's negligence in the principal case should preclude him from recovery.

CONSTITUTIONAL LAW — PERSONAL RIGHTS: CIVIL, POLITICAL, AND RELIGIOUS — GRANDFATHER CLAUSES. — A Maryland statute provided that the following persons should be entitled to registration as voters in municipal elections: (1) taxpayers assessed for at least $500, (2) naturalized citizens, (3) their children, (4) citizens who prior to 1868 were entitled to vote in any of the United States, (5) their lawful descendants. *Held*, that the statute is contrary to the Fifteenth Amendment. *Anderson* v. *Myers*, 182 Fed. 223 (Circ. Ct., D. Md.).

An amendment to the Oklahoma Constitution provided that no person

should be registered as an elector of that state unless able to read and write; but that no person who was on or before January 1, 1866, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person should be denied the right to register and vote because of such illiteracy. *Held*, that the provision is not contrary to the Fifteenth Amendment. *Atwater* v. *Hassett*, 111 Pac. 802 (Okla.). See NOTES, p. 388.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — INVOLUNTARY SERVITUDE. — An Alabama statute provided that any person who, with intent to defraud his employer, obtained advances on a contract of personal service and failed without good cause to repay or to perform such service should be punished by fine; and the failure to repay or to perform was made *primâ facie* evidence of such fraudulent intent. The statute was attacked as violating the Thirteenth Amendment to the federal Constitution and the legislation thereunder. *Held*, that it is unconstitutional. *Bailey* v. *Alabama*, U. S. Sup. Ct., Jan. 3, 1911. See NOTES, p. 391.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — LIMITATION OF CAMPAIGN EXPENSES AS AFFECTING CANDIDATES' RIGHT OF FREE SPEECH. — A primary election law provided that no candidate for nomination to office should expend more than fifteen per cent of the salary of the office on campaign expenses. Suit was brought against the Secretary of State to restrain him from certifying the names of candidates, on the ground that the statute was unconstitutional and void, in that it violated the right of free speech. *Held*, that the statute is constitutional. *Adams* v. *Lansdon*, 110 Pac. 280 (Idaho).

A limitation of campaign expenses, in so far as it interferes with a candidate's expressing his views, impairs his right of freedom of speech and publication, since anything making the exercise of a right less convenient or effective impairs it. *Cf. Ex parte Harrison*, 212 Mo. 88. The sovereign, like any employer, must necessarily be able to impose conditions on an employment, even though such conditions preclude the exercise of rights guaranteed by the Constitution. *McAuliffe* v. *New Bedford*, 155 Mass. 216. Yet this principle is not applicable to a candidate for office who has not yet become an employee. It has been stated that the right of freedom of speech enables one to publish anything if not blasphemous, seditious, obscene, or defamatory. *Ex parte Harrison*, *supra*. Such a rule, however, overlooks the right of a state, within its police power, to pass laws incidentally affecting rights guaranteed by the Constitution. *State* v. *Bair*, 92 Ia. 28; *Anderson* v. *State*, 96 N. W. 149 (Neb.). It is within the police power to impose conditions on the carrying on of certain forms of business where the public welfare is concerned. *State* v. *Bair*, *supra*. A condition on being a candidate for office is equally intended for the public welfare, and seems properly included within the scope of the expansive police power.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES: CLASS LEGISLATION — CLASSIFICATION ON BASIS OF WEALTH. — A statute, designed to protect poor immigrants from fraud, forbade private persons to engage in receiving deposits of money for safe-keeping or transmission without a license. Bankers whose average deposits per client for the preceding year were not less than $500, and those who should give a bond for $100,000 were exempted. It was attacked as unconstitutional on the ground of unjust and unequal classification. *Held*, that the objection is sound. *Lee* v. *O'Malley*, 69 N. Y. Misc. 215 (Sup. Ct.). *Held*, that the statute is constitutional. *Engel* v. *O'Malley*, U. S. Sup. Ct., Jan. 3, 1911.

Of the two decisions that of the United States Supreme Court seems clearly the better. In matters of classification the initial presumption ought always

to be strongly in favor of constitutionality. *Gundling* v. *Chicago*, 177 U. S. 183; *County of Mobile* v. *Kimball*, 102 U. S. 691. The New York court seems, on the contrary, to have thrown the burden of proof upon the state. It is difficult to believe that reasonable men could see no relation between the size of average annual deposits and the likelihood that the banker in question is dealing principally with persons of small means, unskilled in financial matters, who need the very protection this statute is designed to furnish. Nor does the requirement of a bond seem an unfair discrimination on a basis of wealth rather than integrity and discretion. Bonds are required in other occupations, as those of auctioneers, itinerant vendors, oleomargarine manufacturers, and liquor sellers. *Wiggins* v. *Chicago*, 68 Ill. 372; *State* v. *Harrington*, 68 Vt. 622; *Hawthorn* v. *People*, 109 Ill. 302. Nor does it seem unreasonable on principle to consider the ability to furnish security an index of that stability and trustworthiness which ought to be possessed by those who as bankers occupy a fiduciary relation to the public.

COVENANTS RUNNING WITH THE LAND — COVENANT TO ISSUE PASS. — A and B granted a right of way to the C railroad on condition that the company should issue annual passes to A and B during their several lives. There was a covenant by the grantee, for itself and assigns, to perform the condition. The D company bought the road at a foreclosure sale, and refused to issue a pass to the successors of A and B. They sought to compel specific performance of the covenant. *Held*, that the decree will be granted. *Munro* v. *Syracuse, Lake Shore, & Northern R. Co.*, 200 N. Y. 224.

Covenants to issue passes have usually been held to be purely personal, and not binding on the assigns of the covenantor. *Helton* v. *St. Louis, Keokuk, & Northwestern R. Co.*, 25 Mo. App. 322; *Eddy and Cross, Receivers*, v. *Hinnant*, 82 Tex. 354. A covenant to pay rent, however, will run with the land, even though the grant be in fee. *Van Rensselaer* v. *Hays*, 19 N. Y. 68. The court in the principal case decides that the covenant to issue a pass is in the nature of a covenant for perpetual rent. Rent may be paid in service, and free passage over a trolley road might be considered a service paid as compensation for the use of the land. *Cf. Dunbar* v. *Jumper*, 2 Yeates (Pa.) 74. But rent is a charge payable periodically throughout the duration of the estate. See 2 MINOR, INSTITUTES OF COMMON AND STATUTE LAW, 4 ed., 40. *Cf. Nehls* v. *Sauer*, 93 N. W. 346 (Ia.). In the principal case, the covenant is to issue passes during the several lives of the grantors, while the grant is in fee. If the covenant is not to pay rent, it does not run with the land, and the plaintiff is not entitled to this remedy. His proper course is to exercise his right of reentry for condition broken.

ELECTIONS — PLURALITY OF VOTES CAST FOR A DISQUALIFIED PERSON. — At a direct primary election a plurality of the votes was cast for a man who had died after his name had been placed upon the ballot, but ten days before the election. The fact of his death was widely published together with a statement urging votes for him, as it was believed that, by statute, if a plurality of votes was cast for him, a vacancy would be created which could be filled with another man of his political beliefs. The relator obtained the next highest number of votes and sought to compel the defendant to certify his name as nominee. *Held*, that the statute does not apply and that the relator is entitled to be so certified. *State ex rel. Bancroft* v. *Frear*, 128 N. W. 1068 (Wis.). See NOTES, p. 393.

EXTRADITION — INTERNATIONAL EXTRADITION — OFFENSES OF A POLITICAL CHARACTER. — The prisoner, a member of a revolutionary party in Russia, which had perpetrated many acts of violence, killed a constable. The constable

had requested the prisoner to accompany him to the police station for investigation but had accused him of no crime and had not threatened to arrest him. The killing of a constable is called a political crime in Russia and may be tried by a special tribunal. The extradition treaty between the British Empire and Russia excludes extradition for offenses of a political character. *Held*, that Manitoba should surrender the prisoner to Russia. *Re Federenko*, 15 West. L. R. 369 (Manitoba, K. B., Oct. 18, 1910). See NOTES, p. 386.

FALSE PRETENSES — DEFENSES — COLLECTING HONEST DEBT BY FALSE PRETENSES. — The defendant falsely represented to the prosecutor that he was sent to buy a cow for a butcher, whose agent he claimed to be. They agreed on a price of twenty-eight dollars, and the defendant led the prosecutor's cow away. Later, instead of paying the money, the defendant presented to the prosecutor a judgment against him for fifty dollars which had been assigned to the defendant. *Held*, that the defendant cannot be convicted of obtaining property by false pretenses. *State* v. *Williams*, 69 S. E. 474 (W. Va.).

To convict for obtaining money or goods by false pretenses, a specific intent to defraud must be proved. *People* v. *Baker*, 96 N. Y. 340. So if the defendant *bonâ fide* believed that he had a right to obtain the money or goods from the prosecutor, the intent to defraud was absent. *Rex* v. *Williams*, 7 C. & P. 354. See *The Queen* v. *Hamilton*, 1 Cox C. C. 244, 247. A misunderstanding of the Williams case has led to the frequent statement of a broad rule that one who by a false pretense procures another to pay a debt already due does not commit this statutory crime because no injury is done. See 2 BISHOP, CRIMINAL LAW, 8 ed., § 466; 2 WHARTON, CRIMINAL LAW, 8 ed., § 1197. This may be true where the debtor intends to pay the debt and knows that he is doing so. *People* v. *Thomas*, 3 Hill (N. Y.) 169; *Commonwealth* v. *Thompson*, 3 Pa. L. J. 250. See *Commonwealth* v. *Leisy*, 1 Pa. Co. Ct. Rep. 50. *Contra*, *Regina* v. *Parkinson*, 41 U. C. Q. B. 545. Certainly in all other cases, of which the principal case is an example, the debtor has been defrauded. *People* v. *Smith*, 5 Parker Cr. Rep. (N. Y.) 490. *Contra*, *State* v. *Hurst*, 11 W. Va. 54. The existence of a debt due the prisoner, however, may be evidence, coupled with other circumstances, from which the jury may find that there was no specific intent to defraud. *People* v. *Getchell*, 6 Mich. 496; *Commonwealth* v. *McDuffy*, 126 Mass. 467. *Contra*, *People* v. *Smith*, *supra*. But *cf.* *People* v. *Griffin*, 2 Barb. (N. Y.) 427.

HUSBAND AND WIFE — PRIVILEGES AND DISABILITIES OF COVERTURE — STRICT CONSTRUCTION OF STATUTE GIVING SEPARATE RIGHTS. — The plaintiff sued her husband for assault and battery, under a statute declaring that married women may sue for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried. *Held*, (three judges dissenting) that the plaintiff cannot recover. *Thompson* v. *Thompson*, 218 U. S. 611.

Several courts have reached a like result under similar statutes. *Freethy* v. *Freethy*, 42 Barb. (N. Y.) 641; *Peters* v. *Peters*, 42 Ia. 182. Under the same type of acts, however, a wife may successfully sue her husband for the recovery of property. *Wood* v. *Wood*, 83 N. Y. 575. See *Carney* v. *Gleissner*, 62 Wis. 493. Other courts allow her to acquire title against him by adverse possession. *Union Oil Co.* v. *Stewart*, 110 Pac. 313 (Cal.); *McPherson* v. *McPherson*, 75 Neb. 830. The difficulty is often stated to be more than procedural, and to involve the unity of person resulting from marriage. *Phillips* v. *Barnet*, 1 Q. B. D. 436. But this objection has been largely abrogated by statute. *Southwick* v. *Southwick*, 49 N. Y. 510; *Burkett* v. *Burkett*, 78 Cal. 310. Another frequent ground of the decisions is public policy: that the sanctity of the home would be undermined and the breach kept open by allowing an action.

Longendyke v. *Longendyke*, 44 Barb. (N. Y.) 366. The obvious answer is that the breach might never have occurred had an action been imminent. In the face of the words of the statute the decision seems a severe application of the rule that statutes in derogation of the common law are to be strictly construed.

INSURANCE — NATURE AND INCIDENTS OF INSURANCE CONTRACTS — WHEN RIGHT OF ACTION FOR REVOCATION ACCRUES. — The defendant company wrongfully cancelled a policy of insurance on the life of A. After A's death, three years later, suit was brought on the policy. *Held*, that the action lies. *Baumann* v. *Metropolitan Life Ins. Co.*, 128 N. W. 864 (Wis.).

The confusion in the decisions on the effect of repudiation by the insurer upon the insured's right of action on the policy is illustrated by several cases following a company's attempted reduction in the face of its outstanding policies. Massachusetts, which denies the theory of anticipatory breach of contract, held that no action lay until after the death of the insured. *Porter* v. *American Legion of Honor*, 183 Mass. 326; *Newhall* v. *American Legion of Honor*, 181 Mass. 111. New York, unmindful of the anticipatory breach doctrine there followed, also denied legal relief during the life of the insured. *Langan* v. *American Legion of Honor*, 174 N. Y. 266. An earlier case permitting immediate recovery was overlooked. *Fischer* v. *Hope Mutual Life Ins. Co.*, 69 N. Y. 161. New Jersey, however, held this to be an anticipatory breach and allowed recovery at once. *O'Neill* v. *American Legion of Honor*, 70 N. J. L. 410. An immediate action, founded on an actual and not on an anticipatory breach, should be given. The peculiar nature of life insurance contracts necessitates co-operation on the part of the insurer; a contract by the company to accept premiums is implied in fact in every case. Hence repudiation and refusal of premiums is a present breach, giving rise to an action for damages for the loss of the whole contract and starting the running of the Statute of Limitations. WILLISTON'S WALD'S POLLOCK, CONTRACTS, 362–364.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — LIABILITY OF INITIAL CARRIER. — The Carmack Amendment provides that in interstate shipments the initial carrier shall issue a bill of lading for the goods and "be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass," notwithstanding any stipulation to the contrary, and gives the initial carrier an action of indemnity against the one on whose line the loss occurs. An interstate shipment was made, by the terms of which the receiving railroad, the defendant, was to be liable only for loss upon its own rails. The goods were lost by a connecting carrier. The shipper sued the initial carrier. *Held*, that the act is constitutional and the plaintiff may recover. *Atlantic Coast Line R. Co.* v. *Riverside Mills*, U. S. Sup. Ct., Jan. 3, 1911.

The difficulty of placing the responsibility for the loss and the frequent necessity of suing in a distant jurisdiction put the shipper at a disadvantage and often drive him to accept unfavorable settlements. A remedy is here sought under the Commerce clause. *Gibbons* v. *Ogden*, 9 Wheat. (U. S.) 1, 196. See 20 HARV. L. REV. 481. The facts of the principal case do not raise, and the court refrains from considering, the difficult question presented by a situation where this statute would seemingly force the first railroad to accept as a potential debtor any connecting line the shipper may designate, without regard to the inclination of the first, or the solvency of the connecting carrier. As a matter of statutory construction, it is at least arguable that this should have been considered. See *The Employers' Liability Cases*, 207 U. S. 463, 501.

INTERSTATE COMMERCE — CONTROL BY STATES — POLICE POWER. — A state statute was construed as prohibiting any limitation of liability for a

telegraph company's negligent failure to deliver telegrams sent to a person in another state. *Held*, that the statute is constitutional. *Western Union Telegraph Co.* v. *Commercial Milling Co.*, 31 Sup. Ct. 59.

Against the validity of this exercise of the state's police power through a statute founded upon the policy of the state to hold telegraph companies to the high standard of care that is desirable in callings quasi-public in nature, it was chiefly urged that the statute interfered with interstate commerce. The court, however, held that no direct restraint ensued and sustained the enactment under the language of a previous case, finding that it may be "fully carried out . . . without in any manner affecting the conduct of the company with regard to the performance of its duties in other states." *Western Union Telegraph Co.* v. *James*, 162 U. S. 650, 660. For a discussion of the principles involved, see 22 HARV. L. REV. 437.

JUDGMENTS — EQUITABLE RELIEF — ENFORCEMENT OF JUDGMENT FOR ADVANCE PAYMENTS ON CONTRACT OF SALE REPUDIATED BY BUYER. — In a contract for the sale of hops, A was to deliver in October, 1906, and B was to make part payments in the preceding April, May, and September, and on delivery. In March, B repudiated the contract. In May, A brought an action for $4000, comprising the first two payments, and final judgment was rendered in his favor in December, 1907. A did not tender delivery of the hops, which, in October, 1906, had a market value in excess of the contract price, but subsequently sold them at a loss. B now asks to have the enforcement of the judgment enjoined. The decree of the trial court refusing the injunction was affirmed by necessity, the court being evenly divided. *Livesley* v. *Krebs Hop Co.*, 112 Pac. 1 (Or.).

Since the market price at the time for delivery was higher than the contract price, if A had sued for a breach of the entire contract, he could have recovered only nominal damages (for the year 1906). *Tufts* v. *Bennett*, 163 Mass. 398; *Jones* v. *Jennings*, 168 Pa. St. 493. In the action for the advance payments, B might have urged that this was A's proper remedy, since B had repudiated the entire contract besides refusing to make the payments in question. *Acme Food Co.* v. *Older*, 64 W. Va. 255. See WILLISTON'S WALD'S POLLOCK, CONTRACTS, 362. But this point, not being taken, was waived. *Krebs Hop Co.* v. *Livesley*, 51 Or. 527. If B had made the advance payments, and A had wrongfully failed to deliver, B could have recovered what he paid. *Cherry Valley Iron Works* v. *Florence Iron River Co.*, 64 Fed. 569. See WILLISTON, SALES, § 600. Similarly if, after recovering judgment for advance payments, A had wrongfully failed to deliver, it is submitted that the enforcement of the judgment should have been enjoined. But the seller is excused from tendering delivery, if, when it is due, the buyer repudiates the contract or refuses to make overdue payments. *Cort* v. *Ambergate, etc. Ry. Co.*, 17 Q. B. 127. Since the litigation was in progress during October, 1906, A was excused from tendering delivery. The result of the principal case, therefore, seems sound in refusing to disturb the judgment.

LEGACIES AND DEVISES — CLASSES OF LEGACIES AND DEVISES — CONDITIONS IN RESTRAINT OF MARRIAGE: WHEN VOID. — A testatrix, having several daughters and one incompetent son, left the son's share to trustees for him for life, and after his death to her "unmarried daughters." Assuming that the beneficiaries were to be determined, not at the death of the testatrix, but at the death of the son, it was contended that the word "unmarried" ought to be stricken out as an illegal condition. *Held*, that the condition was not illegal. *Robinson* v. *Martin*, 200 N. Y. 159.

The Roman law held no donee bound by conditions tending to restrain his marriage. The ecclesiastical courts grafted this principle upon the law of

England. Proving unreasonably narrow, it was undermined by numberless subtle distinctions, until the law was thrown into such confusion that "a court would not appear to act too boldly whichever side of the proposition they adopted." *Stackpole* v. *Beaumont*, 3 Ves. Jr. 89, 98. One will not, therefore, quarrel with the result of the principal case, but the result seems better than the reasoning; *i. e.* that any condition is to be held valid unless there was actual intent on the part of the testator to discourage marriage, even though its obvious effect will be to do so. Some authority supports this doctrine. *Jones* v. *Jones*, 1 Q. B. D. 279; *Scott* v. *Tyler*, 2 Dick. 712, 722; *Mann* v. *Jackson*, 84 Me. 400; *Harlow* v. *Bailey*, 189 Mass. 208, 212. But the silent authority of the mass of decisions is against it. See cases collected in the dissenting opinion of CULLEN, C. J. On principle it seems that no sensible rule can be laid down but this: that each case should be considered with regard to all the circumstances, and decided on its own inherent reasonableness. See 2 REDFIELD, WILLS, 3 ed. 291, note. The state is interested in the prevention of race suicide and immorality, not the punishment of whimsical testators. *Commonwealth* v. *Stauffer*, 10 Pa. St. 350, 353. See 2 JARMAN, WILLS, 5 Am. ed., 573. Only when as a practical matter the condition will be a material check upon marriage should it be stricken out.

MORTGAGES — PRIORITIES — FLOATING SECURITIES: DEBENTURES. — Where an English corporation had charged all its property "whatsoever and wheresoever, both present and future" with a floating mortgage in the form of a debenture, payable on demand, the debenture holder, by claiming a prior lien, sought to prevent a judgment creditor from garnishing one of the mortgagor's assets. *Held*, that as the debenture was still floating and had not as yet attached to any specific asset the judgment creditor was entitled to have his garnishment order made absolute. *Evans* v. *Rival Granite Quarries*, [1910] 2 K. B. 974. See NOTES, p. 389.

NEGLIGENCE — DEFENSES — INJURY SUSTAINED IN SAVING PROPERTY ENDANGERED BY ANOTHER'S NEGLIGENCE. — Employees of the defendant company negligently removed a service cock from a city water main, permitting the water to be forced into an open window of apartments of which the plaintiff was caretaker. While she was attempting to close the window the plaintiff's clothes became soaked with water, and illness resulted. The court drew an inference of fact that there was no chance of closing the window without getting wet. *Held*, that the plaintiff is not entitled to recover. *Taylor* v. *Home Telephone Co.*, 128 N. W. 728 (Mich.).

The decision represents the view adopted by the Michigan courts, and a few other jurisdictions. *Cook* v. *Johnston*, 58 Mich. 437; *Pike* v. *Grand Trunk Ry. Co.*, 39 Fed. 255. See 16 HARV. L. REV. 379. The general rule, however, seems to be that it is not contributory negligence *per se* for one with reasonable prudence to expose himself to danger, for the purpose of saving his own or another's property from injury. *Liming* v. *Illinois Central R. Co.*, 81 Ia. 246; *Wasmer* v. *Delaware, Lackawanna, & Western R. Co.*, 80 N. Y. 212. The courts adopt this rule more readily in cases of saving human life. *Eckert* v. *Long Island R. Co.*, 43 N. Y. 502; *Henry* v. *Cleveland, C., C. & St. L. Ry. Co.*, 67 Fed. 426. And the plaintiff who has acted instinctively has usually been allowed to recover. *Cf. Coulter* v. *American Merchants' Union Express Co.*, 56 N. Y. 585. In the principal case the plaintiff deliberately walked into the water, and the court, applying the maxim *volenti non fit injuria*, holds that this alone is enough to bar a recovery. It seems that the right to recover should depend upon the reasonableness of the plaintiff's act, though she became wet deliberately in closing the window. *Cf. McKenna* v. *Baessler*, 53 N. W. 103 (Ia.); *Owen* v. *Cook*, 81 N. W. 285 (N. D.). But see 13 HARV. L. REV. 599. The decisions

are uniform in not allowing a plaintiff to recover who has acted unreasonably to save property exposed to danger by the negligence of the defendant. *Pegram* v. *Seaboard Air Line Ry. Co.*, 139 N. C. 303.

NEGLIGENCE — DUTY OF CARE — DUTY TO RESCUER OF PERSON ENDANGERED BY DEFENDANT'S NEGLIGENCE. — Through the negligence of the defendant, A's horses were frightened by the defendant's engine and became unmanageable alongside of the defendant's tracks, so that A was placed in a dangerous position. The plaintiff tried to rescue A, and received injuries for which he sued the defendant. *Held*, that the plaintiff can recover. *Dixon* v. *New York, New Haven, & Hartford R. Co.*, 92 N. E. 1030 (Mass.).

Endangering oneself to save life, it is well settled, is not necessarily contributory negligence such as to bar recovery by the rescuer. *Eckert* v. *Long Island Railroad*, 43 N. Y. 502. But most of the cases consider the question of contributory negligence merely, without explaining how any duty to the rescuer arises upon which to ground his action. To maintain an action for negligence there must be a duty owing from this particular defendant to this particular plaintiff. See *Sweeny* v. *Old Colony & Newport R. Co.*, 10 Allen (Mass.) 368, 372. Once the plaintiff has come upon the track, the defendant must use reasonable care to avoid an accident. But then it is generally too late to save the plaintiff by any amount of care, so there is no failure to discharge this duty. But the foreseeable consequence of endangering A is that the plaintiff will try to save him. The negligence towards A is the proximate cause of the plaintiff's injuries. *Maryland Steel Co.* v. *Marney*, 88 Md. 482. The defendant, therefore, owes the plaintiff a duty not so to imperil A as to induce the plaintiff to act to his injury. This is the result reached by the principal case, and other courts have come more blindly to the same conclusion. *Pennsylvania Co.* v. *Langendorf*, 48 Oh. St. 316. See *Donahoe* v. *Wabash, St. Louis, & Pacific Ry. Co.*, 83 Mo. 560, 564.

NUISANCE — WHAT CONSTITUTES NUISANCE — TUBERCULOSIS SANITARIUM. — The plaintiff sued for an injunction on the ground that the defendant's tuberculosis sanitarium was a nuisance under a statute declaring any act which annoys, injures, or endangers the comfort, repose, health, or safety of others to be a nuisance. The lower court denied relief on the grounds that there was no real danger, and that in the light of scientific investigations the existing public fear of tuberculosis was unfounded and imaginary. *Held*, that an injunction should issue. *Everett* v. *Paschall*, 111 Pac. 879 (Wash.).

In basing its decree on the disturbance of the plaintiff's comfortable enjoyment by fear, the court has run counter to Blackstone and early common-law decisions. *Baines* v. *Baker*, 1 Ambl. 158; *Anonymous*, 3 Atk. 750. The English courts still demand a real and appreciable danger before granting an injunction in hospital cases. *Fleet* v. *Metropolitan Asylums Board*, 2 T. L. Rep. 361. In this country such institutions are not nuisances *per se*. *Barnard* v. *Sherley*, 135 Ind. 547. In general, a nuisance requires physical, and not merely mental, discomfort. *Cleveland* v. *Citizens Gas Light Co.*, 20 N. J. Eq. 201. It must also appear that the acts complained of would affect all reasonable persons similarly situated. *Rogers* v. *Elliott*, 146 Mass. 349. In the closely analogous case of explosives only the actual danger of injury is considered. *Heeg* v. *Licht*, 80 N. Y. 579. Nor will equitable relief be granted unless the complainant shows that his injury will be real and the damage irreparable. *Vickers* v. *City of Durham*, 132 N. C. 880. On the other hand, one prior decision has been based on personal fear. *Stoller* v. *Rochelle*, 109 Pac. 788 (Kan.). In view of the better established grounds on which relief might have been granted in the principal case, the court appears to have taken an unwarranted and hasty step that may involve serious difficulties for at least one type of our most humane institutions.

POLICE POWER — REGULATION OF BUSINESS AND OCCUPATIONS — NINE-HOUR LAW FOR WOMEN. — A Michigan statute provided that no female should be employed in any factory, mill, warehouse, etc., for more than fifty-four hours in any week, nor more than ten hours in any day, with the exception of persons engaged in preserving perishable goods in fruit and vegetable canning establishments. *Held*, that the statute is constitutional. *Withey* v. *Bloem*, 128 N. W. 913 (Mich.).

For a discussion of the principles involved, see 21 HARV. L. REV. 495, 544.

POLICE POWER — REGULATION OF BUSINESS AND OCCUPATIONS — REQUIREMENT OF BANK DEPOSITORS' GUARANTY FUND — COMPULSORY INCORPORATION OF BANKS. — A state statute provided that every state bank should pay an annual assessment of one per cent of its deposits for the purpose of creating a common guaranty fund for depositors. *Held*, that the statute is constitutional. *Noble State Bank* v. *Haskell*, U. S. Sup. Ct., Jan. 3, 1911.

A similar state statute also restricted the business of banking to corporations. *Held*, that the statute is constitutional. *Shallenberger* v. *First State Bank of Holstein*, U. S. Sup. Ct., Jan. 3, 1911.

The first decision affirms a case discussed in 22 HARV. L. REV. 231. See also 23 HARV. L. REV. 292, where the case reversed by the second decision is discussed. For a discussion of the principles peculiar to the second case, see also 23 HARV. L. REV. 629.

POWERS — TERMINATION OF PRECEDING ESTATE — DESTINATION OF INCOME UNTIL APPOINTMENT. — Under a marriage settlement funds were settled in trust for the husband for life or until bankruptcy, then in trust for the issue of the marriage as he should appoint, and in default of appointment, for all the children. The husband became bankrupt without having exercised his power. *Held*, that those taking under the gift over are entitled to interest accruing prior to an appointment. *In re Master's Settlement*, 55 Sol. J. 170 (Eng., Ch. D., Dec. 21, 1910).

Where there is a power of appointment with a gift over in default of exercise of the power, it is well settled that upon termination of the prior estate before the power is exercised, those taking in default of appointment take a present vested interest subject to be divested by a subsequent appointment. *Doe* v. *Martin*, 4 T. R. 39. And having such an estate they are entitled to the present enjoyment of their interest unless a provision for accumulation has been made. *Coleman* v. *Seymour*, 1 Ves. 209. Clearly no accumulation was intended here and the result arrived at is sound.

QUASI-CONTRACTS — RECOVERY FOR BENEFITS CONFERRED WITHOUT CONTRACT — OWNER'S ACQUIESCENCE PROCURED BY FRAUD. — The steamship Olympia with a cargo of coal was stranded on a reef. One Pierce, master of a pilot boat, in a uniform donned for the purpose of deceit, boarded the Olympia and told the master, a foreigner, that he was authorized to assist the vessel. The master acquiesced and Pierce ordered the men from the libellant's boats to come on board and jettison the coal. The jettison lightened the vessel and aided her in floating. *Held*, that the men who did the work are entitled to recover compensation for it. *The Olympia*, 181 Fed. 187 (Dist. Ct., S. D. Fla.).

There was no obligation imposed by law on the defendant to save the vessel which was so affected with a public interest that the law would grant recovery to one performing it for him. See KEENER, QUASI-CONTRACTS, 341. The plaintiffs' only ground for recovery is that the services rendered preserved the defendant's property; but no recovery is allowed if the service is against the owner's protest. *Earle* v. *Coburn*, 130 Mass. 596. Even if the service is rendered without the defendant's knowledge the majority of courts do not allow recovery.

Bartholomew v. *Jackson*, 20 Johns. (N. Y.) 28. *Contra*, *Chase* v. *Corcoran*, 106 Mass. 286. In the principal case the defendant's acquiescence in the service was obtained by the fraud of Pierce, who was either the agent or the principal of the plaintiffs. If the former, they would be barred by his fraud. *Elwell* v. *Chamberlin*, 31 N. Y. 611. The consent thus obtained would be nugatory, and the plaintiffs would be in the position of one who officiously confers benefits on another and so cannot recover. *Boston Ice Co.* v. *Potter*, 123 Mass. 28. If Pierce was the plaintiffs' principal, they were working for him and should not be allowed to charge the defendant for it. See KEENER, QUASI-CONTRACTS, 350. On either assumption, therefore, the decision seems erroneous.

RECEIVERS — RIGHT OF EXONERATION: WHETHER SUBJECT TO SET-OFF ON EQUITABLE EXECUTION BY CREDITORS. — A receiver was appointed for a company, and gave a bond with sureties conditioned on his duly accounting for what he received or became liable to account for as receiver. He incurred trade liabilities for which he was entitled to be indemnified by the estate, to the extent of £900, but his cash account was deficient by £400, which he was unable to pay. The trade creditors claimed that the estate was liable to them for £900 and that it could recover £400 from the sureties for the receiver's default. *Held*, that the sureties are not liable, and that the creditors can recover only £500. *In re British Power Traction and Lighting Co., Limited*, [1910] 2 Ch. 470.

If the receiver was in default to the estate, the sureties are liable. The decision therefore depends on whether there can be a set-off. This involves a consideration of the nature of the creditors' claim against the estate. It is sometimes intimated that the estate is directly liable for goods supplied to the receiver for the benefit of the estate. See *Knickerbocker* v. *McKindley Coal & Mining Co.*, 172 Ill. 535. If this were strictly true, the creditors in the principal case would be entitled to the relief asked for. But the creditors' right is really based on the receiver's right to exoneration, and is in the nature of an equitable execution. See 14 HARV. L. REV. 67. They gave credit to the receiver, and the liability of the estate runs to him. *Hendrie & Bolthoff Mfg. Co.* v. *Parry*, 37 Col. 359; *Stuart* v. *Boulware*, 133 U. S. 78. The receiver's right of exoneration is cut down by any liability which he is under to the estate, and the creditors' right suffers the same fate. *In re Johnson*, 15 Ch. D. 548. The sureties are not liable because the account between the receiver and the estate is in favor of the former. Therefore, the equities being equal, the loss must fall on the creditors. But see *Commonwealth* v. *Gould*, 118 Mass. 300.

REFORMATION OF INSTRUMENTS — REFORMATION FOR MISTAKE OF LAW. — A mortgage-tax statute declared that no conveyance could be effective as security unless that purpose appeared in the deed. A, being indebted to B, conveyed land to him by an absolute deed, and a separate contract was made by which B agreed to reconvey on payment of the debt. The parties intended the transaction to have the effect of a mortgage, and both were ignorant of the statute. *Held*, that the deed be reformed. *Forest Lake State Bank* v. *Ekstrand*, 128 N. W. 455 (Minn.). See NOTES, p. 394.

RESTRAINT OF TRADE — MONOPOLY — AGREEMENT BETWEEN COMPETITORS TO SELL AT CERTAIN PRICE. — Competitors in the city of Cork and vicinity agreed among themselves not to sell liquors in that territory below certain fixed prices. The prices fixed were reasonable. *Held*, that, as the agreement is reasonable, it is not invalid as in restraint of trade. *Cade & Sons* v. *Daly & Co.*, [1910] 1 I. R. 306.

Contracts by a vendor of a business not to engage in the same business are unlawful only if unreasonable. *Anchor Electric Co.* v. *Hawkes*, 171 Mass. 101.

But contracts between competitors fixing prices are almost universally declared invalid because restricting competition and tending toward monopoly. *Cummings* v. *Union Blue Stone Co.*, 164 N. Y. 401; *Nester* v. *Continental Brewing Co.*, 161 Pa. St. 473. In these cases the test of reasonableness is not involved; except that if it has no tendency at all toward monopoly the contract is valid. *Phillips* v. *Iola Portland Cement Co.*, 125 Fed. 593. But complete monopoly is not essential. *Chicago, etc. Coal Co.* v. *People*, 214 Ill. 421. Nor is the fact material that the restraint is partial, in that the market controlled is small. *Craft* v. *McConoughy*, 79 Ill. 346. That the present prices fixed are reasonable does not make the contracts valid. *Central Ohio Salt Co.* v. *Guthrie*, 35 Oh. St. 666. Nor is the argument of weight that the contract prevents ruinous competition. *More* v. *Bennett*, 140 Ill. 69. The totality of public policy is the test. Hence, because they felt that public policy favored the restriction of liquor sales, some courts have sustained such agreements. *Anheuser-Busch Brewing Ass'n* v. *Houck*, 27 S. W. 692 (Tex.). Similarly, if courts cease to regard unrestricted competition as a *panacea* and unmixed blessing, they may find nothing against public policy in agreements between competitors fixing prices under some circumstances. *Park & Sons Co.* v. *National Wholesale Druggists' Ass'n*, 175 N. Y. 1; *Over* v. *Byram Foundry Co.*, 37 Ind. App. 452, 458.

Specific Performance — Affirmative Contracts — Contract for Sale of Expectant Estate. — A devised land to B in fee, provided she remained his widow; but if she should marry, then to C, D, and E. B, while still a widow, conveyed her estate to C and D; then D conveyed to C. E had agreed to sell her interest to C. C filed a bill to compel E to convey. *Held*, that the decree will not be granted. *Cummings* v. *Lohr*, 92 N. E. 970 (Ill.).

At common law, a contingent interest in land was not alienable to a stranger; it could, however, always be released to the one having the estate in possession. *Williams* v. *Esten*, 179 Ill. 267; Williams, Real Property, 21 ed., 367. In the principal case C held the estate in possession, and as E had the only outstanding interest, his right to specific performance of the contract to convey would seem to be clear. C's position as the one in possession of the preceding estate was apparently not noticed, and the court, treating him as a stranger, denied relief. If C were to be treated as a stranger, the apparent impossibility of rendering an effective decree would seem to be the ground for refusing specific performance. A deed purporting to convey an expectant estate is treated as an executory contract enforceable only on the vesting of the estate. *Mudge* v. *Hammill*, 21 R. I. 283. A decree ordering such a conveyance would accomplish nothing. But this difficulty might be overcome, it is submitted, by a decree ordering a conveyance with covenant of warranty. *Cf. Robertson* v. *Wilson*, 38 N. H. 48. By estoppel, the estate would vest in the grantee if B married. Or a decree that the defendant convey when the estate vests would be equally effective. *Cf. Pegge* v. *Skynner*, 1 Cox Ch. 23.

Statute of Frauds — Part Performance — Contract to Devise Land for Personal Services. — The plaintiff lived with the defendant's intestate, performing many personal services and submitting to strict theories of living, in consideration of a parol promise to devise the house to her. This was not done, but shortly before the intestate's death the keys of the house were given to the plaintiff. A recovery for most of the services in *quantum meruit* would be barred by the Statute of Limitations. *Held*, that specific performance of the contract should be granted. *Gladville* v. *McDole*, 93 N. E. 86 (Ill.).

It is well settled in England that performance of personal services of any sort will never take a parol contract for the conveyance of land out of the Statute of Frauds. *Maddison* v. *Alderson*, 8 App. Cas. 467. This is based on the doctrine that specific performance is granted only if the plaintiff's performance

discloses the existence of a contract concerning this land, whereas these services might well have been rendered for a pecuniary compensation. And in American jurisdictions which have adopted the English theory, it has been declared that constructive possession will not be sufficient evidence of such a contract. *Miller* v. *Lorentz*, 39 W. Va. 160. But the weight of American authority favors a recovery in these cases, provided the services rendered were such that they could not be adequately compensated by money. *Rhodes* v. *Rhodes*, 3 Sandf. Ch. (N. Y.) 279. This is more readily recognized where a recovery for the services would be barred by the Statute of Limitations. *Warren* v. *Warren*, 105 Ill. 568. But see *Terry* v. *Craft*, 87 S. W. 844 (Tex.). It is inequitable to allow the plaintiff, who has acted on the defendant's assurances, to be placed in such a position that the damages he would recover at law would not put him *in statu quo*. The services in the principal case probably fall within this rule.

TELEGRAPH AND TELEPHONE COMPANIES — LIABILITY TO ADDRESSEE — LIABILITY FOR DELAY OR NON-DELIVERY. — The plaintiff wrote to W. soliciting a loan of money to be used in avoiding a sacrifice sale of certain property, and urging an answer by telegraph. W. wired at once, "will mail you draft to-day"; but the delivery to the plaintiff was negligently delayed several days. The plaintiff consequently sold her property at a sacrifice and then sued the telegraph company in tort. *Held*, that the plaintiff can recover. *Western Union Telegraph Co.* v. *Lawson*, 182 Fed. 369 (C. C. A., Ninth Circ.).

It is hard to determine what right, if any, of the sendee's has been infringed in cases of negligent delay. In England a sendee has no action unless the sender was his agent, or the altered message an intentional fraudulent representation by the company. *Dickson* v. *Reuter's Tel. Co.*, 3 C. P. D. 1, 6; *Playford* v. *United Kingdom Electric Tel. Co.*, L. R. 4 Q. B. 706. American courts advance four grounds for allowing the sendee to sue. (1) The sendee has a property in the message and should recover for its wrongful detention, like a consignee of goods. See *Young* v. *Western Union Tel. Co.*, 107 N. C. 370, 372. This view has not met with approval. See *Western Union Tel. Co.* v. *Allen*, 66 Miss. 549, 556. (2) The sendee is treated as principal and the sender as his agent in sending the telegram. *Milliken* v. *Western Union Tel. Co.*, 110 N. Y. 403. See *Butner* v. *Western Union Tel. Co.*, 2 Okl. 234. This would provide only for cases of actual agency. (3) The sendee is treated as beneficiary of the sender's contract. *Frazier* v. *Western Union Tel. Co.*, 45 Or. 414, 417, 418; *Western Union Tel. Co.* v. *Adams*, 75 Tex. 531, 536. This would not cover most cases without a straining of the facts. (4) The telegraph company is a public agency and responsible alike on its public undertaking to sender and sendee, the duty arising with acceptance of the telegram. *Western Union Tel. Co.* v. *Allen*, 66 Miss. 549; *New York & Washington Printing Tel. Co.* v. *Dryburg*, 35 Pa. St. 298. But see 17 HARV. L. REV. 365. Theoretically the English courts have reached the right result. If the sendee is to have a right to sue it should come from the legislature. *Herron* v. *Western Union Tel. Co.*, 90 Ia. 129; *Wadsworth* v. *Western Union Tel. Co.*, 86 Tenn. 695, 707.

TITLE, OWNERSHIP, AND POSSESSION — WHAT POSSESSION IS NECESSARY TO MAINTAIN ACTION OF FORCIBLE ENTRY AND DETAINER. — The plaintiff occupied premises owned by the defendant under a lease expiring November 1. On September 3 the defendant forcibly ejected the plaintiff's watchman. In an action of forcible entry and detainer, the defendant offered evidence tending to prove that the plaintiff had made a parol surrender of the lease in August, and that the defendant had taken possession. *Held*, that the evidence is admissible. *Schwinn* v. *Perkins*, 78 Atl. 19 (N. J., Ct. Err. & App.).

If the defendant offered this evidence to show that he had the right to im-

mediate possession, it should not have been admitted. The statute is designed to prevent any interference with the peaceable possession of land which would tend to a breach of the peace, and, given a forcible entry, the plaintiff need only establish the fact of his actual peaceable possession. *Craig* v. *Donnelly*, 28 Mo. App. 342. A trespasser may maintain the action if he has possession; though courts differ as to just when the mere occupancy of a trespasser ripens into possession. *Cain* v. *Flood*, 14 N. Y. Supp. 776; *Hodgkins* v. *Price*, 132 Mass. 196. In the principal case, however, the plaintiff had remained in possession after the expiration of his term. The defendant's evidence at best would only show that the plaintiff was not in exclusive possession; and having regard to the intent of the statute, the actual, peaceable possession of the plaintiff, though not exclusive and without right, would seem to be sufficient to require the defendant to enforce his superior right by the aid of the courts rather than by self-help. But see *Sitton* v. *Sapp*, 62 Mo. App. 197. If this is so, the evidence was irrelevant, and should not have been admitted.

TORTS — APPLICATION OF RULE OF FLETCHER *v.* RYLANDS. — The defendant's milldam broke, and the resulting flood destroyed a portion of the plaintiff's dam below. *Held*, that the plaintiff cannot recover without showing negligence on the part of the defendant. *City Water Power Co.* v. *City of Fergus Falls*, 128 N. W. 817 (Minn.).

The court admits that the doctrine of *Fletcher* v. *Rylands* is still law in Minnesota, but refuses to apply it here on the ground that milldams are not a non-natural user of land, but are highly beneficial, and are encouraged by statutes. Logically there is no reason for not applying the doctrine. To be sure the defendant has not brought the water upon his land in the first instance, but he has retained and collected it there for his own purposes, and it is likely to do mischief if it escapes. The English courts have applied the doctrine to just such a case. *Nichols* v. *Marsland*, 2 Ex. D. 1. The grounds given for exception practically allow the courts to throw an insurer's liability on a landowner or not according as their ideas of policy and common sense may dictate. The result reached in this particular case is undoubtedly the fair one. *Peters* v. *Devinney*, 6 U. C. C. P. 389; *Livingston* v. *Adams*, 8 Cow. (N. Y.) 175; *Inhabitants of Shrewsbury* v. *Smith*, 12 Cush. (Mass.) 177. It might better have been attained more directly.

TORTS — INTERFERENCE WITH BUSINESS OR OCCUPATION — WHETHER DAMAGE TO CONTRACT RIGHT BY NEGLIGENT ACT OF THIRD PARTY IS ACTIONABLE TORT. — The plaintiff's tug was towing a ship from one port to another under a contract. The defendant's vessel negligently collided with and sank the tow. The tug was uninjured. The plaintiff sued the defendant to recover the amount of towage remuneration so lost. *Held*, that plaintiff has no cause of action. *La Société Anonyme de Remorquage à Hélice* v. *Bennetts*, 27 T. L. R. 77 (Eng., K. B. Div., Nov. 8, 1910). See NOTES, p. 397.

VOLUNTARY ASSOCIATIONS — NAME OF ORGANIZATION: RIGHT TO EXCLUSIVE USE. — The plaintiff existed for several years in Connecticut as a voluntary benefit association, and was then incorporated. The defendant was a similar organization in New York, and established branches in Connecticut. The characteristic portion of the defendant's name was the same as the plaintiff's name. Because of the resulting confusion in the public mind, and the consequent interference with the plaintiff's work, the plaintiff sued to enjoin the defendant from using this name. *Held*, that the defendant be enjoined. *Daughters of Isabella No. 1* v. *National Order of Daughters of Isabella*, 78 Atl. 333 (Conn.).

For a discussion of the principles involved, see 23 HARV. L. REV. 572.

BOOK REVIEWS.

QUESTIONED DOCUMENTS. A Study of Questioned Documents with an Outline of Methods by which the Facts may be Discovered and Shown. By Albert S. Osborn. With an Introduction by Professor John H. Wigmore. Rochester, N. Y.: The Lawyer's Co-Operative Publishing Co. 1910. pp. xxiv, 501.

Much may be expected of a book which comes vouched for by Professor Wigmore, and Mr. Osborn in no wise disappoints such expectations. To say that his is by far the best book upon the subject in English is inadequate praise.

The dogmatism of many really competent experts, the obvious limitations of the crude empiricism of bank tellers, the extravagances of graphologists, and the unhappy operation of over-technical rules of evidence in many jurisdictions, which preclude the use of sufficient data on which to base a sound conclusion, have given rise to a distrust of expert evidence as to writings which to-day is not justified. Mr. Harris's account of the expert in handwriting, written, it is fair to say, over thirty years ago, but unaltered in the current edition of Hints on Advocacy, has no application to the fair, temperate, and reasoned statement of what may and what may not be discovered and determined with respect to the authorship and authenticity of documents which Mr. Osborn has given us. Modern experimental psychology has furnished a sure foundation, confirmed in its application to handwriting by abundant experimentation and experience, and the ingenuity of the optician has provided standard instruments giving results that speak for themselves to the layman as well as to the expert. The author's chief insistence is upon sound reasons that may be made clear to the trier of fact. He holds rightly that opinions, of themselves, are of comparatively small moment. The function of the expert is to assist in getting at the truth, and he may do this most effectively by being able to give and allowed to give reasons which can be apprehended by and will appeal to the common sense of the trier. Judges who have discretion to exercise in the admission of evidence and particularly in permitting the use in court of modern scientific appliances and appellate judges who still restrict the witness and counsel to documents in the cause for other purposes, should read and ponder the discussion of those points. In proportion as the reasons may not be gone into fully and the opinion may not be given upon and tested by adequate standards, the investigation ceases to be of real utility.

Practicality in the best sense of the term characterizes the entire work. It is evident that the author has read and reflected upon the kindred branches of learning that lay a foundation for or contribute to his subject. But there are no *a priori* discussions. Descriptions and illustrations of the instruments and appliances at the command of the expert with detailed explanations as to the use of them, a full collection of illustrations from litigated cases, and illustration of every point as to characteristics of handwriting by numerous examples had from everyday letter-writing bring the points home effectively to the ordinary reader. Withal, what is not usual in a scientific work, the book is very readable.

On page 441 a curious error, perhaps not unnatural in a New Yorker, makes it appear that a recent trial at *nisi prius* in Wisconsin was before a Justice of the Supreme Court. R. P.

ETHICAL OBLIGATIONS OF THE LAWYER. By Gleason L. Archer. Boston: Little, Brown and Company. 1910. pp. 367.

The scope of this book is stated thus in the preface: "This volume enters into every question of professional deportment that can ordinarily confront

the lawyer. It does not lay down platitudes and commands without the reasons therefor, but discusses each proposition, pointing out the why and wherefore of the rule. It is practical. It enters into details. It takes up each detail concretely and solves it, instead of passing it over with a flourish of general language that means nothing definite to the reader."

This promise of practical treatment the author makes good, as witness his injunction to the lawyer addressing a public gathering to "shake some other chestnut tree than that labelled 'rascality of lawyers'"; or his warning against permitting the office air to be polluted by "the villainous aftermath of cigarette smoking"; or his recommendations that "leaving the office door ajar is a commendable practice" as a "suggestively cordial and emboldening" invitation to enter the office, and that since "law books are all alike to the ordinary client, so far as his estimate of value is concerned," the lawyer should arrange those which he has "in the most imposing array possible."

As will be gathered, no historical or philosophical treatment of the subject is attempted, but the book contains much sensible and wholesome advice.

The form of the volume is attractive, and the author has done the profession a service by printing in the appendix not only the canons of ethics adopted by the American Bar Association, but also David Hoffman's delightful and inspiring Resolutions.

THE PRINCIPLES OF INTERNATIONAL LAW. By T. J. Lawrence, M.A., LL.D. Fourth Edition, revised and rewritten. Boston: D. C. Heath. 1910. pp. xxi, 745.

Since the publication of the first edition of Dr. Lawrence's book in 1895 the succession of events such as the Spanish-American, the South African, and the Russo-Japanese Wars, the Hague Conferences of 1899 and 1907, and the International Naval Conference of 1908–1909 has furnished abundant new material. The editions since 1895 have embodied some of this new material. In the third edition supplementary chapters were printed in an appendix. This fourth edition is, however, thoroughly revised and rewritten. Of course, the historical treatment has not been greatly changed. There has been some condensation in matter and form. In spite of this, the number of pages has increased by more than sixty. Old subjects receive new treatment. Dr. Lawrence calls attention to the doctrine of "equality of all independent states" which "seems breaking up before our eyes." It is doubtful whether a favorable reception will be given to Dr. Lawrence's proposal to give the name *client states* "to all those international persons who are obliged to surrender habitually the conduct of their external affairs to any degree, great or small, to some state authority external to themselves." For such entities the terms "protectorate" and "suzerainty" have probably been too long recognized to be set aside. New topics such as *condominium* and leased territory are discussed. Dr. Lawrence calls this "an age that is about to add warfare in the air to warfare on land and warfare at sea."

The entire revision and the introduction of a large amount of new material brings Dr. Lawrence's book up to date while retaining the well-known excellent features of the earlier editions. G. G. W.

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LIABILITY FOR HONEST MISREPRESENTATION.

IT is common enough in our law to find that several parts of it which have grown up with little regard to each other have nevertheless logical and intimate connection, and that the doctrines laid down in one set of cases are hardly reconcilable with those established in others.

It is impossible that such a situation can be allowed to exist permanently. Some method of harmonizing the different doctrines must be worked out. The simplified forms of pleading which have almost everywhere superseded the earlier forms which were based on sharp distinctions between the various actions known to the common law, make it even more essential to establish harmony than it was where forms of action were clearly distinguished. Then it was possible as a practical matter to lay down a rule as to one action not wholly consistent with the rule established in regard to another. Then, in the language of an acute writer, "Each category was self-sustaining, its existence was its justification."[1] But when the question presented by pleadings is reduced simply to an inquiry whether on a given state of facts a plaintiff is entitled to any relief, it is no longer possible to keep contradictory rules apart.

The law governing misrepresentation furnishes a striking instance of the truth of what has been said. Misrepresentation will call up to a lawyer's mind, primarily, the action on the case for deceit, and the requirements of a proper declaration in that action.

[1] Francis H. Bohlen, 59 Am. L. Reg. 298, 315.

But misrepresentation is legally important in other aspects, and some of them may profitably be compared with the rules established or in dispute in the action for deceit.

I. Early History of Deceit.

The word "deceit" in the old writ of deceit, and in the action on the case for damages for deceit, based on the earlier writ, seems to have carried to the minds of early lawyers no more definite meaning than the word "fraud" carries to the minds of modern lawyers. The typical cases relate to simulation of the defrauded plaintiff by bringing an action or suffering a recovery, or entering into a bond or recognizance in his name.[2]

An examination of the numerous cases cited in the earlier abridgments under the heading of "Disceit" will convince any one how little the subject, as understood by the early lawyers, had to do with the action for deceit as now understood.

Some cases, however, were included under this heading which ultimately formed the basis of the modern law. These were cases of deceit in the sale of goods by means of a false warranty; and there are also some expressions in the later year books in regard to deceit by false promises, from which the law of special assumpsit was afterwards developed.[3]

But there was no recognition until the case of Pasley *v.* Freeman [4] of any general doctrine that statements false and known to be such by the speaker made to induce action by another were ground of liability. The contrary, indeed, is directly stated in the well-

[2] "Besides the special action on the case, there is also a peculiar remedy, entitled an action of deceit, (F. N. B. 95) to give damages in some particular cases of fraud, and principally where one man does anything in the name of another, by which he is deceived or injured; (Law of *nisi prius*, 30) as if one brings an action in another's name, and then suffers a nonsuit, whereby the plaintiff becomes liable to costs: or where one obtains or suffers a fraudulent recovery of lands, tenements, or chattels, to the prejudice of him that hath right. As when by collusion the attorney of the tenant makes default in a real action, or where the sheriff returns that the tenant was summoned when he was not so, and in either case he loses the land, the writ of *deceit* lies against the demandant, and also the attorney or the sheriff and his officers; to annul the former proceedings, and recover back the land. (Booth, real actions, 251; Rast. Entr. 221, 222.)" 3 Bl. Comm. 165.

[3] Ames, History of Assumpsit, 2 Harv. L. Rev. 1, 8 *et seq.*

[4] 3 T. R. 51 (1789).

known case of Chandelor *v.* Lopus,[5] less than a century earlier. And where, as in a leading case like Pasley *v.* Freeman, a learned judge dissents, it not infrequently happens, as in that case, that the dissenter expresses the early law, and objects to make any advance from it.

Since the decision of Pasley *v.* Freeman it has not been doubted that one who makes a statement of fact which he knows to be false for the purpose, or apparent purpose, of inducing another to act, is liable for the damage caused by the action which he induced.

II. Warranty of Title.

The early authorities on the law of warranty which furnished the foundation for the decision of Pasley *v.* Freeman have also been the basis for the subsequent development of the law of warranty, and in this subsequent development the necessity of expressly warranting a statement to be true in order to make out an actionable case has been gradually done away with. This process was first completed in regard to warranty of title. In Dale's Case,[6] decided in 1585, the plaintiff sued on the ground that the defendant had sold as his own certain goods to the plaintiff which in fact belonged to another. Two judges held that the action did not lie because *scienter* was not alleged, but added, "if he had affirmed that they were his own goods then the action would lie." It may be inferred, therefore, that these judges were of opinion that either *scienter* without affirmation by the defendant, or affirmation without *scienter*, was enough. The third judge (Anderson), however, thought the action should lie. "For it shall be intended that he that sold had knowledge whether they were his own goods or not."

Anderson, J., was apparently prepared to adopt the modern doctrine of implied warranty of title, reasoning that the mere sale of the goods necessarily involved an affirmation. In another decision in the following reign [7] it was held that a seller out of pos-

[5] Cro. Jac. 4. This case is chiefly familiar in the law of warranty. But the court not only held that the defendant would not be liable for selling the stone in question affirming it to be a bezoar stone, unless he warranted it to be such, but further said: "and although he knew it to be no bezoar stone, it is not material." But see comment upon this sentence in 14 App. Cas. 357.

[6] Cro. Eliz. 44.

[7] Roswel *v.* Vaughan, Cro. Jac. 196.

session who made no affirmation of title was not liable to one who bought from him though it turned out the seller had no title. Another case in the same reign [8] still leaves it uncertain whether the court regarded *scienter* as necessary. Apparently *scienter* was not alleged, but on motion to arrest judgment for plaintiff the court seems to have assumed the allegation, saying, "the sale of goods which were not his own, but affirming them to be his goods, knowing them to be a stranger's, is the offense and cause of action," and the motion was denied. In 1689, however, Lord Holt decided that one who sold oxen in his possession, affirming they were his, was liable to the buyer if in fact they were not. *Scienter* on the part of the defendant was held an unnecessary allegation, though in one report of the case [9] it was said that the objection that no such allegation was made might have been good upon demurrer, but after verdict the declaration was well enough. Any doubt as to Lord Holt's opinion which this decision might leave was set at rest in 1700 by the case of Medina *v.* Stoughton.[10] On demurrer to a plea in which the defendant set up that he bought the goods in question in good faith and sold them in good faith, Holt said, "the plea is ill and the action well lies. Where a man is in possession of a thing which is a colour of title an action will lie upon a bare affirmation that the goods sold are his own."

Since these decisions it has not been doubted that an affirmation of title, though made in good faith by a seller, renders him liable; and the law has taken the further step that even without such an affirmation an obligation will be implied, at least if the seller was in possession when the sale took place.[11]

III. Warranty of Quality.

In regard to warranty of quality the law has followed a similar path, although somewhat more slowly. From cases at the beginning of the nineteenth century [12] it is made clear that by that time

[8] Furnis *v.* Leicester, Cro. Jac. 474.

[9] Cross *v.* Garnet, 3 Mod. 261; s. c. *sub nom.* Crosse *v.* Gardner, 1 Show. *68; Carthew, 90.

[10] 1 Ld. Raym. 593; s. c. 1 Salk. 210.

[11] See Williston, Sales, sec. 218.

[12] Yates *v.* Pym, 6 Taunt. 446; Bridge *v.* Wain, 1 Stark. 504; Jendwine *v.* Slade, 2 Esp. 572; Power *v.* Barham, 4 A. & E. 473.

it had become established that it was not necessary, in order to render the seller liable as a warrantor, that the word "warrant," or any word of promise, should be used. This was not such a departure from early law as it might now seem, for even in the early law, when the use of the word "warrant" seems to have been essential, the gist of the action seems to have been regarded as the deceit caused by a misrepresentation deliberately made to induce a bargain. How little any idea of promise was regarded as involved in a warranty may be inferred from the early rule that there could be no warranty as to a future event.[13] In other words, a warranty must be a misrepresentation of an existing fact in precisely the same way that a fraudulent misrepresentation must now be in order to furnish a basis for action.

At the present day it is law, nearly, if not quite, everywhere where the common law prevails, that any representation of fact as to the quality of the goods made for the apparent purpose of inducing the buyer to purchase them amounts to a warranty. A certain confusion has, indeed, been caused by a statement of Buller, J., in Pasley *v.* Freeman. That judge said, "It was rightly held by Holt, C. J., cited in the subsequent cases, and has been adopted ever since, that an affirmation at the time of a sale is a warranty provided it appears on evidence to have been so intended." In fact, in the decisions referred to, Holt, if the report may be trusted, said nothing whatever about the necessity of intention; that requirement was interpolated by Buller himself. Many of the best courts in this country have in terms rejected any such requirement for making out an express warranty;[14] and even in jurisdictions where the requirement of intention is still laid down, intent to warrant is not used as the equivalent of intent to contract: it means intent to affirm as a fact.[15] Pennsylvania seems to be the only State where it is clearly held that an intent to enter into a contract to

[13] 3 Bl. Comm. 165.

[14] See Williston, Sales, sec. 201.

[15] "In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case it is a warranty, in the latter not." De Lassalle *v.* Guildford, [1901] 2 K. B. 215, 221. The statement was borrowed from Benjamin, Sales, 5 Eng. ed., 659, and has also been approved by American courts. Carleton *v.* Jenks, 80 Fed. 937 (C. C. A.); Roberts *v.* Applegate, 153 Ill. 210.

answer for the truth of a statement is a necessary element for establishing an express warranty.[16]

There can be no doubt now, of course, that a seller may promise, in consideration of the purchase of goods from him, that he will be answerable for their present, or, indeed, for their future condition. Nor is it open to doubt that a seller who in terms warrants the goods which he sells, thereby enters into such a contract. But when a seller is held liable on a warranty for making an affirmation of fact in regard to goods in order to induce their purchase, to hold that such an affirmation is a contract is to speak the language of pure fiction. In truth, the obligation imposed upon the seller in such a case is imposed upon him not by virtue of his agreement to assume it, but because of a rule of law applied irrespective of agreement. The obligation is quasi-contractual, inasmuch as the remedy of assumpsit is allowed for its enforcement. The confusion of thought as to the nature of the obligation seems to be in great measure due to the allowance in modern times of this remedy for breach of any warranty, whether in reality constituting a contract or only a representation. But assumpsit was not allowed as a remedy for breach of warranty until near the close of the eighteenth century.[17] And a declaration in tort without an allegation of *scienter* is still generally regarded as permissible.[18] These decisions are not, as is sometimes supposed, a mere following of early authority after the reason for the earlier rule has ceased to exist; they involve a recognition of the fact that a warranty is a hybrid between tort and contract. This was clearly recognized by Blackstone,[19] who classifies warranties with contracts "implied by reason and construction of law." Under this heading, together with warranties, he inserts a statement of such obligations as this:

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[16] Holmes *v.* Tyson, 147 Pa. St. 305; Williston, Sales, sec. 199.

[17] The first decision reported permitting it is Stuart *v.* Wilkins, 1 Doug. 18.

[18] Shippen *v.* Bowen, 122 U. S. 575, citing Gresham *v.* Postan, 2 C. & P. 540; House *v.* Fort, 4 Blackf. (Ind.) 293, 295; Hillman *v.* Wilcox, 30 Me. 170; Osgood *v.* Lewis, 2 Har. & G. (Md.) 495, 520; Lassiter *v.* Ward, 11 Ired. L. (N. C.) 443, 444; Trice *v.* Cochran, 8 Gratt. (Va.) 442, 450. To the same effect are Farrell *v.* Manhattan Market Co., 198 Mass. 271; Erie City Iron Works *v.* Barber, 106 Pa. St. 125; Place *v.* Merrill, 14 R. I. 578; Piche *v.* Robbins, 24 R. I. 325; Watson *v.* Jones, 41 Fla. 241; Tyler *v.* Moody, 111 Ky. 191. See, however, the contrary decisions, Mahurin *v.* Harding, 28 N. H. 128; Caldbeck *v.* Simanton, 82 Vt. 69; Slack *v.* Bragg, 76 Atl. 148 (Vt.); Pierce *v.* Carey, 37 Wis. 232.

[19] 3 Comm. 163–165.

"If any one cheats me with false cards or dice, or by false weights and measures, or by selling me one commodity for another, an action on the case also lies against him for damages, upon the contract which the law always implies, that every transaction is fair and honest." [20]

To any one who still inclines to accept as fact the fiction of a contract where a warranty is based on a seller's misrepresentation of the quality of his goods, the argument may be put in this way. If it creates a contract for A to say of his horse when he sells it in order to induce the purchase, "the horse is sound," why is it not equally a contract if B should say precisely the same thing in order to induce a sale of A's horse? If A's words to a buyer really mean "if you will buy my horse I undertake to be responsible for the truth of my assertion that the horse is sound," why does it not equally follow that if B should make similar statements to the buyer to induce the sale of A's horse that the same construction of an offer should be put upon them? A recent decision of the Supreme Court of South Carolina [21] furnishes an interesting comparison in this connection with the well-known case of Derry *v.* Peek.[22] In the latter case the plaintiff was induced to take shares in the company by a misrepresentation of the directors in regard to a right which they stated had been given by special act of Parliament to use steam or other mechanical motive power. In the South Carolina case the plaintiff was induced to buy shares of stock by representations of the seller as to the corporate assets and liabilities. It can hardly be thought that the representations in these two cases are to be distinguished on any other ground than that one was made by a seller, and the other by persons interested in the taking of shares by the plaintiff but not interested as sellers. As a pure question of construction of language, surely if the words in one case amount to an offer to contract, they do so in the other case. In truth, it is submitted they are not words of offer. The only reasonable inference that can be drawn in either case is that representations of fact were made for the purpose of inducing the plaintiff to purchase shares. In the American case it was held that *scienier* need not be alleged or proved, the court saying:

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[20] 3 Bl. Comm. 164, citing 10 Rep. 56.
[21] Iler *v.* Jennings, 68 S. E. 1041 (S. C.).
[22] 14 App. Cas. 337.

"Use of a statement of the corporate business by a director negotiating a sale of his stock therein could not be regarded as other than a direct affirmation of its correctness, and, if it was delivered for the purpose of assuring the buyer of the truth of the facts therein stated, and to induce him to purchase, and the buyer purchases in reliance thereon, there is an express warranty." [23]

The English case held that the directors were not liable because *scienter* was not proved; yet the English decisions on the law of warranty make it evident that the South Carolina Court was following clear English precedents.

An honest misrepresentation, then, made by a seller in regard to the goods sold in order to induce a sale, will render him liable.

IV. Warranty by an Agent of his Authority.

Entirely analogous to the law of warranty in the sale of goods is the warranty which the law imposes upon an agent that he is authorized to act as such. The agent either expressly, or by necessary implication of fact, represents that he is an authorized agent, and it was decided in Collen *v.* Wright [24] that the agent was liable as a warrantor. Cockburn, J., dissented from the decision of the court, and many legal thinkers have agreed with his dissent on the ground that the plaintiff should not have been allowed to recover unless the agent knew of the falsity of his representations; but Collen *v.* Wright has been followed generally in this country,[25] and has been affirmed recently by the House of Lords in England.[26] On this occasion the case of Derry *v.* Peek was pressed upon the attention of the court and somewhat impatiently brushed aside by Lord Halsbury, who delivered the principal opinion, on the ground that Derry *v.* Peek was an action for deceit and in the case at bar the action was contractual. But Lord Halsbury hardly asserted that the contract in such a case is other than a fiction of law imposed upon the agent because of his misrepresentation.[27]

[23] 68 S. E. 1041, 1044.

[24] 7 E. & B. 301, 8 E. & B. 647.

[25] Mechem, Agency, sec. 545.

[26] Starkey *v.* Bank of England, [1903] A. C. 114.

[27] "That which does enforce the liability is this — that under the circumstances of this document being presented to the bank for the purpose of being acted upon, and being acted upon on the representation that the agent had the authority of the prin-

Here again is a case where honest misrepresentation will render a person liable. In one respect, moreover, the doctrine in regard to an agent's warranty has been advanced by the late decision of the House of Lords beyond the analogy of warranty in the law of sales, and beyond the previous authority of Collen *v.* Wright. The defendant in Starkey *v.* Bank of England did not purport to enter into a contract on behalf of his principal with the injured plaintiff. The defendant was a stockbroker, and, as such, presented to the Bank of England, in good faith, at the request of a customer, a power of attorney purporting to be signed by the owner of certain consols, and thereby induced the bank to transfer the consols to a third person. In fact, one of the signatures on the power of attorney was forged.

V. Estoppel in Pais.

Another doctrine which must be considered in this connection is that of estoppel *in pais*. This doctrine has received very wide application in recent years, and has been extended far beyond the limits formerly set for it. Pickard *v.* Sears [28] is usually regarded as the leading authority on the subject. In that case it was stated as a necessary element that the misrepresentation should be "wilfully" made. It was not long, however, before the use of this word was explained in such a way as to deprive it of its natural meaning. In Freeman *v.* Cooke [29] Parke, B., said:

"By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth."

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cipal, which he had not, that does import an obligation — the contract being for good consideration — an undertaking on the part of the agent that the thing which he represented to be genuine was genuine. That contains every element of warranty." [1903] A. C. 114, 118.

[28] 6 A. & E. 469.

[29] 2 Ex. 654, 663.

Long before the case of Pickard *v.* Sears certain equity cases had illustrated the doctrine and applied it, though not under the name of estoppel.[30] At the present day, though there are many expressions still made use of which seem to indicate that either fraud or culpable negligence is an essential element in estoppel, it is certain that positive statements of fact as to matters upon which the speaker should be correctly informed may give rise to an estoppel though there is neither fraud nor negligence. Thus Lord Esher says:

"If a man either by express terms or by conduct makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts." [31]

More explicitly the Massachusetts court has said:

"The usual form of expressing the situation which founds an estoppel *in pais* has been that followed in the rulings given, in which, as in many of the older decisions, it is said that an intent to deceive is a necessary element. . . . But under this formula the jury were not prohibited from finding the intention and the estoppel, if, without more, the plaintiff spoke or acted falsely, knowing or having cause to believe that his words or conduct reasonably might influence the defendant's action. The more modern statement, that one is responsible for the word or act which he knows, or ought to know, will be acted upon by another, includes the older statement that the estoppel comes from an intention to mislead." [32]

The effect of Derry *v.* Peek on the doctrine of estoppel was pressed upon the Court of Appeal soon after the decision of that case, but it was emphatically stated that the decision had no effect upon

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[30] See opinion of Kay, L. J., Low *v.* Bouverie, [1891] 3 Ch. 82, 107.

[31] Carr *v.* The London & Northwestern Railway Co., L. R. 10 C. P. 307, 317, quoted with approval in Tomkinson *v.* Balkis Consolidated Co., [1891] 2 Q. B. 614, 619. See also the definition of Lord Blackburn in Burkinshaw *v.* Nicolls, 3 App. Cas. 1004, 1026, quoted with approval in Tomkinson *v.* Balkis Consolidated Co., [1891] 2 Q. B. 614, 623.

[32] Stiff *v.* Ashton, 155 Mass. 130, 133. See also Nickerson *v.* Massachusetts Title Ins. Co., 178 Mass. 308; Westlake *v.* Dunn, 184 Mass. 260. Decisions to the same effect might easily be multiplied.

the doctrine of estoppel as previously understood.[33] Lindley, J., explained the matter thus: "Estoppel is not a cause of action — it is a rule of evidence which precludes a person from denying the truth of some statement previously made by him."[34] And in the same case Bowen, L. J., repeats this formula in substance: "Estoppel is only a rule of evidence; you cannot found an action upon estoppel."[35]

It is amusing to reflect on the ease with which Lord Bowen would have disposed of such a fiction if the harmonizing of decisions had required instead of forbidden him to do so. Estoppel is a rule of evidence in the same way that conclusive presumptions are rules of evidence. An estoppel, like a conclusive presumption, is a rule of substantive law masquerading as a rule of evidence. To speak of conclusive evidence of something admittedly false may be a useful formula, but it disguises the truth. An estoppel is in effect a conclusive admission of the truth of a non-existent fact. This supposed fact may be essential either for a cause of action, for a defense, or for a replication. As the fact is non-existent it is obvious that the admission and nothing else supplies the requirement which otherwise would be lacking. If the admitted non-existent fact alone creates a cause of action, defense, or replication, the admission or estoppel is the sole foundation, if other facts are needed in conjunction, a partial foundation of the cause of action, defense, or replication.

An estoppel then may be, and frequently is, either the sole or the main foundation of a cause of action. When a warehouseman states to an intending purchaser in answer to an inquiry that the seller has a certain quantity of goods stored in the warehouse, and relying on that statement the purchaser completes the bargain, the warehouseman is estopped to deny the truth of his statement.[36] The only essential facts in the purchaser's case when he sues the warehouseman are the misrepresentation, his own reliance upon it, and perhaps a demand and refusal; and the allegation of these facts constitutes a perfect cause of action, wherever reformed pleading

[33] Tomkinson *v.* Balkis Consolidated Co., [1891] 2 Q. B. 614; Low *v.* Bouverie, [1891] 3 Ch. 82.

[34] Low *v.* Bouverie, [1891] 3 Ch. 82, 101.

[35] Low *v.* Bouverie, [1891] 3 Ch. 82, 105.

[36] Gillett *v.* Hill, 2 Cr. & M. 530. See also Knights *v.* Wiffen, L. R. 5 Q. B. 660, and cases cited in Williston, Sales, sec. 418, note 46.

has reached such a state that nothing further is required of the plaintiff than to state the material facts upon which his claim is founded. Nor is it material that the warehouseman was neither fraudulent nor negligent.[37] His statement relates to a matter about which he must have accurate knowledge at his peril, or refrain from talking about it. So where a bailee issues a receipt for goods never received, and a purchaser relies upon the statement in the receipt that goods have been received.[38] Or where a bailee fails to take up a receipt or bill of lading which mercantile usage requires him to take up where the goods behind the document are delivered, and in consequence a purchaser of the outstanding document is deceived by the representation which it contains that the carrier still holds the goods described and is induced to buy the document, or to advance money on the faith of it.[39] Or where a corporation issues a certificate of stock to one who is not a shareholder, and a subsequent purchaser, relying upon the misrepresentation of the certificate, buys it.[40] Or where a trustee applied to for information as to the property of his *cestui que trust* by one proposing to lend money to the latter, gives misinformation, reliance upon which causes damage to the lender.[41] In all these cases, and their number might easily be increased, a cause of action exists because of damaging misrepresentation, certainly without regard to any fraudulent intent, and probably without regard to any other negligence than necessarily exists when a person whose position qualifies him to have accurate knowledge about a matter makes a misstatement in regard to it.

It is difficult to see how the law of estoppel and the doctrine of Derry *v.* Peek can permanently be kept in separate compartments

[37] It may seem difficult to suppose that such a situation can arise without negligence, but the English decisions seem to show the possibility, holding, as they do, that the warehouseman is estopped by such a representation when the only lack of accuracy in it is the omission to state that the seller has mingled in a mass a quantity of goods larger than that which the buyer proposes to purchase.

[38] Williston, Sales, sec. 419.

[39] *Ibid.* sec. 424.

[40] Tomkinson *v.* Balkis Consolidated Co., [1891] 2 Q. B. 614; *In re* Ottos Kopje Diamond Mines, [1893] 1 Ch. 618.

[41] Burrowes *v.* Lock, 10 Ves. 470; Brownlie *v.* Campbell, 5 App. Cas. 925, 953. In Low *v.* Bouverie, [1891] 3 Ch. 82, the Court of Appeal did not dispute the correctness of this doctrine, but construed the representation made by the trustee as amounting to no more than a statement of the trustee's belief, not a positive assertion of fact.

when law and equity are fused and pleading reduced to a mere statement of the facts of the case. An inquiry which may be made in this connection is what would have been the result of an action against the defendants in Derry *v.* Peek for failing to utilize as directors, on behalf of the corporation whose shares the plaintiff had bought, the right to use steam as a motive power for its cars. It may be assumed that the value of the property would have been enhanced by the use of such motive power and that the directors, therefore, would have been liable if they had failed to make use of it, had they been legally authorized to do so. Could the defendants, who as directors issued a prospectus stating that they had such power, be heard to deny, subsequently, that their statement was correct? Would they not be estopped? If so, then allegations by the plaintiff of the defendants' statement, whether accurate or not, and whether made in good faith or not, and of his own reliance upon it, would be sufficient basis for a judgment in his favor.

VI. Rescission for Misrepresentation.

In some criticisms of the doctrine of the liability for fraud established in England by Derry *v.* Peek, the doctrine of courts of equity as to what constitutes fraud has been compared with the rule of Derry *v.* Peek, and it has been urged that courts of equity have not purported to give a new and different definition of fraud from that supposed to be held by courts of law; that fraud is the same whether relief sought for it is legal or equitable. But the redress which equity gives for fraud is rescission, and as a distinction may well be taken between rescinding a bargain for innocent misrepresentation and holding the person who makes an innocent misrepresentation liable in damages, it does not seem that any forcible argument against the doctrine of Derry *v.* Peek, whatever criticism may be made of that doctrine, can be based on the rule established by equity courts in cases where a right of rescission was the only question involved.

VII. Actions for Damages for Misrepresentation.

Even in actions in form claiming damages for deceit there is much authority to support the proposition that a defendant may

be liable for honestly misrepresenting facts in regard to which he might reasonably be supposed to be peculiarly well informed. In Cooley on Torts it is laid down that a person is liable for deceit when he "supposed his representations to be true, but had no reason for any such belief, and nevertheless made them positively as of known facts, and induced the other to act upon them." [42] This statement is supported by many authorities.

In 1827 Chief Justice Best, in referring to the basis of liability on a warranty by false affirmation, said:

"It has been said, that is because there is a breach of *contract* to rest the action on, and that there is no contract in this case. This is not the true principle; it is this; he who affirms either *what he does not know to be true*, or knows to be false, to another's prejudice and his own gain, is both in morality and law guilty of falsehood, and must answer in damages." [43]

Doubtless it is clear enough to-day that the law of England sanctions no such broad rule, but it is equally clear that American courts which should refuse to follow the decision of the House of Lords in Derry *v.* Peek would have good old English authority behind them. And many American courts of the highest standing at least go much beyond the present limits of the English law. Thus the Supreme Court of Massachusetts in speaking of an action for deceit in representing a horse to be sound has said:

"It is not always necessary to prove that the defendant knew that the facts stated by him were false. If he states, as of his own knowledge, material facts susceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true, and it is no defense that he believed the facts to be true. The falsity and fraud consists in representing that he knows the facts to be true, of his own knowledge, when he has not such knowledge." [44]

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[42] Vol. 2 (3 ed.), 956.

[43] Adamson *v.* Jarvis, 4 Bing. 66. In this case the defendant, who had delivered goods to the plaintiff for the latter to sell as auctioneer, was held liable for his, the defendant's, statement that he was entitled to dispose of them.

In the second edition of Saunders on Pleading and Evidence, at page 60 it is said that "in an action for falsely representing a third person fit to be trusted, a *scienter* must be alleged and proved; though indeed the word 'fraudulently' might be a sufficient allegation in this respect, especially after verdict, Willes, 584. But in an action on the case for fraud, or on misrepresentation of any kind, an express warranty or *scienter* need not be alleged, nor proved if alleged."

[44] Litchfield *v.* Hutchinson, 117 Mass. 195, 197.

It is to be observed that the court makes no inquiry as to whether the defendant honestly believed that he knew the facts — it is enough that he asserted that he knew them; and indeed it is not necessary to satisfy the requirement laid down by the court that the defendant should assert in terms that he knew what he stated to be true — it is enough that he positively asserted that the horse was sound and that the unsoundness of the horse was readily ascertainable. It might well be true not only that the defendant believed the horse to be sound, but that, if his state of mind is to be regarded, he felt perfectly positive of it and even had reasonable grounds for his belief. Nevertheless he would be liable under the instructions approved by the court. That the Massachusetts court is prepared to accept these inferences is apparent from its later decisions. In Chatham Furnace Co. *v.* Moffatt [45] the court said:

"The fraud consists in stating that the party knows the thing to exist when he does not know it to exist; and if he does not know it to exist, he must ordinarily be deemed to know that he does not."

And in its last decision on the subject:

"Due diligence to ascertain the truth in regard to statements made as of matters of fact within one's own knowledge is not enough to relieve the maker of them of liability if they are false and relied upon as true, and the person to whom they are made suffers loss thereby." [46]

Many decisions in Massachusetts and in other jurisdictions go as far, or nearly so, in holding a defendant liable irrespective of good or bad faith, for making a positive false statement as to which he had special means of knowledge.[47]

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[45] 147 Mass. 403, 404.

[46] Huntress *v.* Blodgett, 206 Mass. 318, 324.

[47] Lehigh Zinc & Iron Co. *v.* Bamford, 150 U. S. 665, 673, "where the representations are material and are made by the vendor or lessor for the purpose of their being acted upon, and they relate to matters which he is bound to know, or is presumed to know, his actual knowledge of them being untrue is not essential."

Hindman *v.* First Nat. Bank, 112 Fed. 931 (C. C. A.); Munroe *v.* Pritchett, 16 Ala. 785; Jordan *v.* Pickett, 78 Ala. 331; Prestwood *v.* Carlton, 162 Ala. 327, 333. "The law imposes the duty of ascertaining the truth of statements made in transactions as to material matters, and requires that, if the statements are false, they shall be made good, and that the party shall not take advantage of his own wrong. (Jordan *v.* Pickett, 78 Ala. 331.) One who is negotiating a trade must not recklessly or even innocently assert that as a fact which is untrue if such asserted fact be to any extent an inducement to the other party to enter into the contract. Honest belief in the

Undoubtedly the doctrine that one who positively states a fact as of his own knowledge is liable, if the statement is false, has been

truth of the statement of such fact, while it exculpates from moral fault, does not relieve from the legal liability to make it good."

Goodale *v.* Middaugh, 8 Colo. App. 223, 231; Water Commissioners *v.* Robbins, 82 Conn. 623; Watson *v.* Jones, 41 Fla. 241, 254. "When it is shown that the statement was material and false, and that the defendant's situation or means of knowledge were such as to make it incumbent upon him as a matter of duty to know whether the statement was true or false, the conclusion is almost irresistible that he did know that which his duty required him to know. For this reason the law conclusively presumes from the existence of these facts that defendant had actual knowledge of the falsity of his statement, or, more properly speaking, proof of these facts is sufficient to sustain a charge of actual knowledge, dispensing with further proof upon that subject, and admitting no proof to rebut the fact of actual knowledge, but only proof to rebut the existence of the facts from which such actual knowledge is inferred."

Upchurch *v.* Mizell, 50 Fla. 456; Ward *v.* Trimble, 103 Ky. 153, 159. "The president of a bank, as between himself and parties not with equal means of knowledge of the bank's condition, must be held to know the condition of the bank and consequently whether the statement published as to its condition is true or false. In such cases the presumption of knowledge by the president cannot be avoided by showing that he, in fact, did not know. This harsh rule does not apply, however, to the director of a bank. In an action against a bank, it would not be allowed to say, that its directors were ignorant of the bank's condition, for in such case the law presumes that the directors know every entry made by the subordinate officers; but in an action against the director, personally, no such presumption exists. (Bank *v.* Caperton, 87 Ky. 306.) However, if this bank statement of December 31, 1887, as published and circulated over the signature of the directors, with their knowledge, it would be *prima facie* evidence that they knew whether the same was true or false; but as to a director, he may by proof rebut this presumption of knowledge as to the truth of the statement, which, as said above, the president would not be permitted to do."

Trimble *v.* Reid, 19 Ky. L. Rep. 604; Braley *v.* Powers, 92 Me. 203, 209. "It is not always necessary to prove that the defendant knew that the facts stated by him were false. 'If he states as of his own knowledge material facts susceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true, and it is no defense that he believed the facts to be true. The falsity and fraud consist in representing that he knows the facts to be true of his own knowledge, when he has not such knowledge.' (Litchfield *v.* Hutchinson, 117 Mass. 195.) And in Cole *v.* Cassidy, 138 Mass. 437, it was held that under such circumstances the defendant would be liable, although he believed and had reasonable cause to believe his representations to be true."

Atlas Shoe Co. *v.* Bechard, 102 Me. 197, 203; Phelps *v.* G. C. & C. R. R. Co., 60 Md. 536 (*cf.* Cahill *v.* Applegarth, 98 Md. 493); Fisher *v.* Mellen, 103 Mass. 503; Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403; Weeks *v.* Currier, 172 Mass. 53, 55; Arnold *v.* Teel, 182 Mass. 1, 4; Adams *v.* Collins, 196 Mass. 422; Aldrich *v.* Scribner, 154 Mich. 23; Bullitt *v.* Farrar, 42 Minn. 8 (see also Riggs *v.* Thorpe, 67 Minn. 217; Charles P. Kellogg Co. *v.* Holm, 82 Minn. 416); Sims *v.* Eiland, 57 Miss. 83, 85. "The second plea, which avers in substance that the defendants 'honestly believed' their representation to be true when they made it, was a sufficient answer to the declaration, and the demurrer to it was properly overruled. The replication, that the defendants had no reasonable ground to believe that their representation was true when they

somewhat confused with the doctrine that if no reasonable ground existed for the statement, it is evidence of fraud, or is evidence enough to make out a *primâ facie* case of fraud; but the decisions in Massachusetts and other jurisdictions here relied on certainly go farther than this. A somewhat more subtle line of reasoning, however, may be suggested by those who believe the cases on deceit as a tort are in the main consistent. It may be urged that the authorities, including Derry *v.* Peek, are agreed that a statement made "recklessly, careless whether it be true or false," [48]

made it, is an argumentative denial that they did believe it, for one cannot believe what he has no reasonable ground to believe. . . . The only question is, whether a replication traversing the plea is good. Clearly it is." (*Cf.* Vincent *v.* Corbett, 94 Miss. 46).

Phillips *v.* Jones, 12 Neb. 213; Johnson *v.* Gulick, 46 Neb. 817, 821: Gerner *v.* Mosher, 58 Neb. 135, 154. "The defendants in the present suit, who as directors attested the reports made by the Capital National Bank to the comptroller of the currency, by such act vouched for, or certified to, the absolute truthfulness of the statements therein contained, and not that the report was correct so far as the directors knew or had been advised by the proper performance of their duties as directors. The means of information, this record shows, were accessible to them. It was their duty to know whether the reports were correct or not."

Tate *v.* Bates, 118 N. C. 287; Houston *v.* Thornton, 122 N. C. 365, 373. "There is no allegation or proof that these defendants were guilty of fraud or had actual knowledge of the frauds, or that they knew the representations in the published reports were fraudulent. On the contrary, the basis of the action is that these defendants were men of high character, who would not participate in or connive at fraud, and for that very reason when the reports of the bank were published, the plaintiff, relying on the well-known character of these defendants, trusted implicitly to the correctness of such statements and was misled, to her damage $1100, into buying the eleven shares of the capital stock of the bank, which were wholly worthless, and entailed liability on her besides. It is no answer to this to say that the defendants themselves were also misled as to the condition of the bank and suffered loss. They had opportunity to know the true condition of the bank. They ought to have known. It was their duty to know. They should not have permitted statements to go out upon their authority as to the condition of the bank which were untrue, and relying upon which the plaintiff was led into loss. It may be a hardship upon these defendants, but it would be a greater hardship upon the public and destructive of confidence in banks if directors of good character, whose names are useful in drawing patronage, are absolved from responsibility for fraudulent representations whereby the public are duped and defrauded, because such directors had no actual knowledge of the frauds and did not participate in them. 'Ignorance will not excuse when they had means of knowledge.'"

Whitehurst *v.* Life Ins. Co., 149 N. C. 273; Howe *v.* Martin, 23 Okl. 561; Bower *v.* Fenn, 90 Pa. 359; McCabe *v.* Desnoyers, 20 S. Dak. 581; Shea *v.* Mabry, 1 Lea (Tenn.) 319, 342; Seale *v.* Baker, 70 Tex. 283; Giddings *v.* Baker, 80 Tex. 308; Oneal *v.* Weisman, 39 Tex. Civ. App. 592; Barclay *v.* Deyerle, 116 S. W. 123 (Tex. Civ. App.); Krause *v.* Busacker, 105 Wis. 350.

[48] Lord Herschell in Derry *v.* Peek, 14 App. Cas. 337, 375.

is fraudulent. This idea was expressed by Lord Blackburn in the House of Lords some years before the decision of Derry *v.* Peek: "If when a man thinks it highly probable that a thing exists, he chooses to say he knows the thing exists, that is really asserting what is false — it is positive fraud." [49] Now one who asserts as a fact something of which he has no positive knowledge, not only asserts that the fact is as he states — something which he may well believe — but also impliedly that he knows it is so or that he has an adequate basis of information. If this is not true he is asserting a falsehood as much as if he did not believe the truth of his express statement.[50]

This line of reasoning would probably be accepted by most courts, and in many decisions it is followed under one mode of statement or another without being continued to the inquiries to which it naturally leads, namely, Does it make any difference that the speaker believes that he has knowledge or that he has an adequate basis of information when in fact he has not, or that he speaks believing what he says to be true, but without much reflection and without consciousness of the paucity of his information? It is a merit of Derry *v.* Peek that the House of Lords at least makes its position clear. In its view these inquiries are of vital importance. In each opinion this is made evident — perhaps least so in the elaborate opinion of Lord Herschell, but even his language seems to leave no doubt that he believed that conscious dishonesty of the defendant must be shown.

On the other hand, in the American cases cited above the court proceeded upon the theory that the plaintiff must recover if the defendant asserted as matter of his own knowledge something which in fact he did not know, or for which he had no reasonable basis of belief.

In some jurisdictions the court squarely states that the defendant is liable for the consequences of a positive misstatement of facts as to which he ought to be informed, or at least is liable if he had no reasonable ground for believing the truth of his statement. In others the same principle is veiled under the guise of a conclusive presumption, but in all of them, under the rules enunciated by the courts, a defendant may be held liable though in fact

[49] Brownlie *v.* Campbell, 5 App. Cas. 925, 953.

[50] See Pollock, Fraud in British India, 43.

he honestly believed not only that the statement that he made was true, but also that he knew it to be true.[51] In some of the cases cited it may be that the actual facts involved did not require so extreme a statement, but in most of them the point was necessarily involved in the decision of the court. In Michigan the court has gone perhaps as far as anywhere in holding a defendant liable for innocent misrepresentation. It is broadly laid down

"that the doctrine is settled here, by a long line of cases, that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby either at law or in equity." [52]

This doctrine, however, has been later so far limited as to cover only cases where the profit of the misrepresentation enures to the benefit of the defendant, or he is a party to a contract with the plaintiff induced by the misrepresentation.[53] No such limitation however is contained in the provision of the California Civil Code: [54]

"A deceit within the meaning of the last section is either . . . 2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true."

This provision has been adopted in identical words in Montana,[55] North Dakota,[56] and South Dakota.[57] But it will be observed that under such a statute innocent misrepresentation must be at least accompanied by carelessness to afford a cause of action.

Undoubtedly there are many decisions and more *dicta* opposed to the authorities which have just been cited, but there is certainly

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[51] In other jurisdictions, as in New York, for instance, though it is agreed that making a statement as of actual knowledge may amount to a fraud, the court makes it clear that this can only be when the defendant not only does not in fact know the truth of what he asserts, but is conscious that he does not know it. Hadcock *v.* Osmer, 153 N. Y. 604. So in Corey *v.* Boynton, 82 Vt. 257. This accords with the English doctrine.

[52] Holcomb *v.* Noble, 69 Mich. 396, citing Baughman *v.* Gould, 45 Mich. 483; Converse *v.* Blumrich, 14 Mich. 109; Steinbach *v.* Hill, 25 Mich. 78; Webster *v.* Bailey, 31 Mich. 36; Starkweather *v.* Benjamin, 32 Mich. 305; Beebe *v.* Knapp, 28 Mich. 53.

[53] Aldrich *v.* Scribner, 154 Mich. 23.

[54] Sec. 1710, 2.

[55] Civil Code, sec. 5073, 2.

[56] Civil Code, sec. 5388, 2.

[57] Civil Code, sec. 1293, 2.

enough authority to put the bench and bar upon inquiry as to the intrinsic merit of the proposition that one who makes a positive statement of fact in regard to a matter about which he may reasonably be supposed to have special means of information, and makes the statement for the purpose, or apparent purpose, of inducing another to enter into a business transaction, is liable if the statement is false.

The use of the words "fraud" and "deceit" have probably exercised an unfortunate influence in the development of the law on the subject. These words naturally import consciously dishonest conduct on the part of the defendant. Moreover, the difficulty in extending the limits of liability beyond cases where the defendant is consciously dishonest has been increased by the objection of modern judges and lawyers to the use of fiction in expressing the law. Conclusive presumptions are not now much favored, and such terms as " constructive fraud " and " legal fraud " share the disfavor into which conclusive presumptions of fraud have fallen. This disposition is certainly not to be quarreled with. It is better to state the law in terms which will give rise to as little misunderstanding as possible; but the result reached by means of fictitious statement must not be discarded with the fiction when, as has commonly been the case with fictions in the law, the result reached is desirable though the mode of statement is confusing.

The real issue which should be discussed is thus constantly obscured by the terminology of the subject. The real issue is no less than this: When a defendant has induced another to act by representations false in fact though not dishonestly made, and damage has directly resulted from the action taken, who should bear the loss?

In considering which doctrine is the better, consideration should be given chiefly to two things. First: logical consistency with itself in all parts of the law governing misrepresentation. Secondly: the inherent justice of the rule proposed. That the law of misrepresentation as laid down in Derry *v.* Peek is hopelessly inconsistent with the law governing misrepresentation when relied on as the basis of warranty or estoppel, can hardly be denied. Adherence to what may be regarded as established English doctrine in deceit, estoppel, and warranty is absolutely illogical, and with simplified pleading becomes nearly, if not quite, impossible. It

is a just ground of reproach to the law if a harmonious doctrine cannot be developed.

The inherent justice of the severer rule of liability which in some cases at least holds a speaker liable for damages for false representations, though his intentions were innocent and his statements honestly intended, is equally clear. However honest his state of mind, he has induced another to act, and damage has been thereby caused. If it be added that the plaintiff had just reason to attribute to the defendant accurate knowledge of what he was talking about, and the statement related to a matter of business in regard to which action was to be expected, every moral reason exists for holding the defendant liable.

The precise limits of liability in damages for honest misrepresentation are not fixed at the same place by all the courts which hold that such liability may exist. Two qualifying principles may claim some support in authority or reason. The first of these finds support in the early law, in the dissenting opinion in Pasley *v.* Freeman, and in sundry expressions in modern decisions, as in Michigan.[58] This principle would confine liability to cases where the misrepresentation was made to induce another to enter into a contract with the person making the misrepresentation, and would be consistent with the modern law of seller's warranty, and indeed would find its chief support in cases relating to sales. On the other hand, the principle, though not inconsistent with most decisions relating to the implied warranty by an agent of his authority, since most of them relate to cases where the agent purported to enter into a contract, has been expressly repudiated by the House of Lords as a limitation on the agent's liability.[59] Further, there is no such limitation to liability for misrepresentation created by means of an estoppel, and in the action of deceit the authority, both of courts which approve of Derry *v.* Peek and of courts which do not, gives little support for a distinction between representations which induce a contract with the person making them and representations which induce a contract with another person, or indeed any other detrimental action. Nor is it easy to see on logical or ethical grounds why such a distinction should be made.

The second qualifying principle suggested is that no liability

[58] Aldrich *v.* Scribner, 154 Mich. 23.

[59] Starkey *v.* Bank of England, [1903] A. C. 114.

should exist if there was reasonable ground for believing that the statements made were true. This amounts in effect to denying liability unless the statement was made negligently, though it is not, in terms at least, an adoption of the action on the case for negligence for carelessly spoken words. A court might indeed adopt this qualifying principle without holding doctrines of contributory negligence applicable. The statutes of California and other states cited above excuse a defendant from liability if he had reasonable ground for believing his statement to be true. A similar doctrine seems to exist in North Carolina.[60] It is certainly by no means clear that the courts of these states would put the whole subject on the footing of a duty to use reasonable care in regard to spoken or written words.

It has, however, been ably urged that, subject to appropriate limitations, an action on the case for negligence is properly applicable to misrepresentations made carelessly but not dishonestly.[61] Doubtless under any theory of liability which excludes dishonesty as a necessary element of the cause of action it will generally be found that a defendant who is held liable has been guilty of culpable negligence. But there are objections to throwing the whole matter into the law of negligence, and treating spoken words in the same way that acts are treated. In the first place, the law of liability for false representations has grown up on other lines than the law of negligence. There is a violation of historical continuity in forcing the two together. This should not be an insuperable obstacle if logic and practical convenience demanded the joinder, but this does not seem true. Neither the law of warranty nor that of estoppel is based on negligence, so that no general consistency of the law governing misrepresentation would be attained. Furthermore, if negligence is to be the basis of liability for words regarded from the standpoint of misrepresentation, the same test should logically be applied to defamatory words; but the whole law of defamation is inconsistent with any application of the law of negligence to either spoken or written words, for the law governing defamation "is not a law requiring care and caution in greater or less degree, but a law of absolute responsibility qualified by absolute excep-

[60] See cases cited in note 47, p. 431.

[61] Judge Smith, 14 HARV. L. REV. 184, cited and followed in Cunningham *v.* C. R. Pease Co., 74 N. H. 435.

tions."[62] It is also an objection that if an action for negligent misrepresentation as such were permitted, it would be necessary to limit somewhat arbitrarily the scope of the action; for it is probably true, as has often been said, that to hold every man liable for the consequences of words carelessly spoken would be to impose a degree of liability beyond what is reasonable. Again, the doctrine of contributory negligence would be troublesome to apply. Is it contributory negligence for a man to rely on what he is told by a person in a position to know, and to fail to make an investigation for himself? Though many decisions require that a plaintiff should not have been too foolish in believing what no reasonable man in his position should believe, it is going too far, both in reason and on the authorities, to say that a plaintiff, unless his conduct was not wholly irrational, should lose his rights because he failed to make independent investigation and believed what he was told. It should not lie in the mouth of the man who induced his reliance to assert that the reliance was negligent.[63] If a man makes a statement in regard to a matter upon which his hearer may reasonably suppose he has the means of information, and that he is speaking with full knowledge, and the statement is made as part of a business transaction, or to induce action from which the speaker expects to gain an advantage, he should be held liable for his misstatement. Such a principle most nearly harmonizes the law of misrepresentation in its various aspects.

To avoid misapprehension it should be added that where a person is because of a contract of employment under a duty to speak, as by making a report or giving an opinion as an expert, the law of negligence governs his liability. "As a consequence of his contract of employment the law throws the risk of his statements upon him at an earlier point than it would do otherwise. But for the contract he would not be liable for statements unless fraudulent, or for advice unless dishonest."[64]

The idea that a consciously dishonest state of mind is essential for an action of tort for deceit leads to other consequences than decisions that the statement made by the defendant must be known

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[62] Pollock, Torts, 8 ed., 553 n. See also Peck *v.* Tribune Co., 214 U. S. 185.

[63] Goodale *v.* Middaugh, 8 Colo. App. 223, 231; Gerner *v.* Mosher, 58 Neb. 135; Bower *v.* Fenn, 90 Pa. 359; Krause *v.* Busacker, 105 Wis. 350.

[64] Corey *v.* Eastman, 166 Mass. 279, 287, per Holmes, J.

by him to be false. For instance, if the defendant makes a statement which is false if his words are given the natural meaning which his hearer would give them, but which are true if taken in some unnatural sense which he himself put upon them, there is no dishonesty in the defendant, even though he knew that the facts did not accord with the natural meaning of his words, provided that natural meaning did not occur to him. Both in England and in Massachusetts it has been held that under these circumstances a defendant is not liable.[65]

In the Massachusetts decision the dissenting opinion of Holmes, J., in which Field, C. J., concurred, is a very effective argument against the view of the majority of the court. It seems odd that in Massachusetts, where it has been held since, as well as before, the decision in question, that a man who positively asserts as facts matters about which he should be expected to know, is liable, although he thinks he knows, it should also be held that a man who asserts what is false, and what he knows is false, if his words be taken in their natural meaning, may, if he used them in an unnatural sense, prove this and so escape liability.

There seems no reason whatever for not holding a defendant for the natural consequences of his actions when the question involved relates to tort as well as when it relates to contract. In the formation of contracts the parties are rightly held to the natural meaning of what they say. It can only be the idea, induced by the words "fraud" and "deceit," that conscious dishonesty is necessary which can have brought about a different result in an action of tort.

In England the courts have gone still farther in consequence of the doctrine that a guilty state of mind is a necessary element in order to make the defendant liable. Both in Derry *v.* Peek [66] and in Angus *v.* Clifford [67] the court held that no recovery could be had though the defendants made statements which were untrue and which it is absolutely impossible to suppose they did not know were untrue. On the most favorable view the courts simply did not think that the untruth was believed to be of any importance by the defendants, who therefore had no intent to defraud if that

[65] Derry *v.* Peek, 14 App. Cas. 337; Angus *v.* Clifford [1891], 2 Ch. 449 (Ct. App.) Nash *v.* Minnesota Title & Trust Co., 163 Mass. 574.

[66] 14 App. Cas. 337.

[67] [1891] 2 Ch. 449 (Ct. App.).

word be used in the sense naturally given to it. In Derry *v.* Peek the defendants stated that their company had a right to use steam motive power for its cars. In fact the defendant directors confidently expected to get that right, but that all of them supposed, or could have supposed, that they actually had it is incredible. Lord Bramwell alone squarely faced and justified all that was involved in the decision of the court. He said:

"It is also certain that the defendants knew what the truth was, and therefore knew that what they said was untrue. But it does not follow that the statement was fraudulently made. . . . A man may know it [the truth], and yet it may not be present to his mind at the moment of speaking; or if the fact is present to his mind, it may not occur to him to be of any use to mention it." [68]

So in Angus *v.* Clifford the defendant stated that a certain published report of an expert on the company's property had been made for the directors. In fact the report had not been made for the directors, but for the promoters who sold the property to the company. It is impossible to suppose that the directors did not know this. Some members at least of the court tried to rest the case on the ground that the defendants were not using the published words of the prospectus in the natural sense in which the plaintiff understood them; but that "made for the directors" can by anybody ever have been supposed to mean "made for some one else" is absurd, and all members of the court lay stress on the point that the defendants did not regard the misrepresentation of fact as "important." If conscious dishonesty on the part of the defendant is a necessary element of tort for misrepresentation these decisions are right, but they represent a distinctly lower standard of morality and justice than the contrary decisions.[69] Moreover, the standard which they adopt is very difficult to apply. A defendant who is charged with false representations, and who can escape by making out that his intentions were honest though his words naturally understood were false, will rarely fail to testify to his own honesty of intention. The issue thus raised of the de-

[68] 14 App. Cas. 337, 348.

[69] In Grosh *v.* Ivanhoe Land Co., 95 Va. 161, the vendor of town lots falsely represented that railroads and other enterprises were established in the town. He was held none the less liable because he believed that they soon would be. See also Whiting *v.* Price, 169 Mass. 576.

fendant's state of mind is difficult to try, and attempts at its decision are quite as likely to promote perjury as justice.

It may properly be urged that the measure of damages in an action for deceit differs from that applicable to actions for breach of warranty or to actions based on estoppel. In an action of tort for deceit it may be said that the law should endeavor to place the plaintiff in as good a position as he would have been in had no tort been committed; that is, if the plaintiff had not entered into the bargain at all. On the other hand, for misrepresentation which amounts to a warranty or estoppel the defendant is compelled to place the plaintiff in as good a position as he would have been in had the misrepresentation been true. Undoubtedly this difference in theory exists, though as matter of fact the weight of authority in this country gives the plaintiff the same measure of damages in tort for deceit as it gives for breach of warranty.[70] But the vital question concerns liability and not the measure of damages for it. If it be granted that the defendant should be liable for honest misrepresentation to the extent suggested, it is of little comparative importance whether the liability should be to make the representation good, or to make good the loss incurred by reliance upon it. There is authority for either way of dealing with the liability.

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[70] See Williston, Sales, sec. 613.

ADMINISTRATIVE EXERCISE OF THE POLICE POWER.

[*Concluded.*]

III.

Judicial Review in Actions for Damages.

WHENEVER administrative action in the exercise of the police power takes the form of the issue of an order to an individual, he may by prompt petition to the courts secure a judicial ruling as to the validity of the administrative command. The same possibility of relief is open to him when he complains that the administration denies him permission to take some action for which its consent is necessary under the law. But other methods of administrative procedure may be so summary that an action for damages affords the only possible means of relief. And wherever loss has actually accrued through administrative action, money compensation is essential to complete redress for any official wrong.

A. *Liability of Public Corporations.*

(1) *The State.* — No action can be maintained against the state without its consent. Even where a statute creates a court of claims with jurisdiction over demands against the state, it is held that the state is not made a debtor by the unauthorized acts of officers in destroying what is not in fact a nuisance.[1] In a case where the court declined to interfere with commissioners in appraising the value of diseased cattle killed, to determine the compensation due from the state under the statute, it was declared that if healthy cattle were killed, the state was not responsible.[2]

(2) *Municipalities.* — Municipal corporations are not immune from the process of the courts; but, by the great weight of authority, no action lies against a municipality for the wrongful acts of

[1] Houston *v.* The State, 98 Wis. 481 (1898).

[2] Shipman *v.* State Live Stock Commission, 115 Mich. 488 (1898).

its officers in executing police ordinances.[3] The decisions are based upon the grounds that the police officers, though chosen by the city, are not servants of the municipality, but general officers,[4] and also that the city is exercising the police power, not for its benefit or interest in its corporate capacity, but for the public good.[5] No liability can be enforced for mere wrongful refusal to issue a license,[6] or wrongful revocation of a license.[7] But in some jurisdictions municipalities are held liable for the positive trespasses of their officers in enforcing police measures.[8] Such liability is sometimes imposed directly by statute. The question whether property destroyed was in fact a nuisance presents itself for judicial cognizance also in suits under statutes making a city or county liable for damages done by mobs.[9]

B. *Liability of Officers.*

(1) *Denial of Permission.* — No action can be maintained against an officer personally for his failure to take action in enforcing the police power,[10] or for his refusal to extend permission to do some act for which a license is required. In an early New York decision, where action was brought against an inspector-general of provisions

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[3] Hand *v.* Philadelphia, 8 Pa. Co. Ct. Rep. 213 (1890), city held not liable for act of health officer in removing to a pest-house a person not in fact infected with small-pox. Plaintiff had already recovered damages from the officer personally; but the case does not appear to have been appealed to a higher court. Evans *v.* City of Kankakee, 231 Ill. 223 (1907), city not liable for negligent fumigation of city calaboose by its officers.

[4] Beeks *v.* Dickinson County, 131 Iowa 244 (1906); Valentine *v.* Englewood, 76 N. J. L. 509 (1908).

[5] Boehm & Loeber *v.* Baltimore, 61 Md. 259 (1884); Gilboy *v.* City of Detroit, 115 Mich. 121 (1897).

[6] Butler *v.* City of Moberly, 131 Mo. App. 172 (1908).

[7] Claussen *v.* City of Luverne, 103 Minn. 491 (1908).

[8] Mayor *v.* Mitchell, 79 Ga. 807 (1887). In Faucheux *v.* Town of St. Martinville, 45 So. 600 (La. 1908), it was held error to dismiss action against town for destruction of plaintiff's house by order of the corporation and mayor, because the town is *primâ-facie* liable and has the burden to prove that the acts of its agents are wholly *ultra vires*. *Cf.* Sumner *v.* Philadelphia, Fed. Cas. 13, 611 (1873), where city was held liable for wrongful detention of vessel for quarantine.

[9] Ely *v.* Board of Supervisors, 36 N. Y. 297 (1867); Brightman *v.* Bristol, 65 Me. 426 (1876).

[10] Whidden *v.* Cheever, 44 Atl. 908 (N. H. 1897), not liable to landlord for refusal to order small-pox tenant transferred to a pest-house.

for condemning certain beef as unmerchantable, Judge Livingston declared that

"an officer, acting under a commission from government, who is enjoined by law to the performance of certain things, *if in his judgment or opinion* the requisites therein mentioned have been complied with, . . . is not answerable to a party, who may conceive himself aggrieved for an omission arising from mistake or mere want of skill." [11]

And a half century later the California court, in holding that the power of the board of pilot commissioners was quasi-judicial and that they were not civilly answerable for denying a license, announced that "whenever, from the necessity of the case, the law is obliged to trust to the sound judgment and discretion of an officer, public policy demands that he be protected from the consequences of an erroneous judgment." [12] But an officer may be held responsible for libel or slander in connection with his disapproval of goods inspected.[13]

Actions for damages, however, are usually based not on non-feasance, but on some positive action which results in actual interference with person or property. But the personal liability of those who exercise governmental authority does not follow of necessity from the fact that in other proceedings their action might be modified or annulled by the courts. A legislator may vote for an unconstitutional statute, an inferior judicial officer may issue a decree which a higher court will later reverse, and yet neither be responsible in damages to individuals aggrieved.

(2) *General Regulations.* — The issue of general regulations by an administrative body is so akin to the exercise of legislative power, that those who issue the regulation are not personally responsible merely for having cast their vote.[14] Few would venture to exercise the discretion vested, at the risk of being called upon to justify their action in a thousand suits for damages.

But the immunity given to those who issue the regulation does not leave the individual without remedy. A regulation which the

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[11] Seaman *v.* Patten, 2 Caines N. Y. Term Rep. 312 (1805).

[12] Downer *v.* Lent, 6 Cal. 94 (1856).

[13] Hubbard *v.* Alleyn, 200 Mass. 166 (1908).

[14] Jones *v.* Loving, 55 Miss. 109 (1877); Baker *v.* State, 27 Ind. 485 (1867), *semble.*

courts deem improper furnishes no protection to inferior officials who execute it.[15]

(3) *Special Orders and Adjudications.* — Where the administrative order relates to an individual instance, the function performed is similar to that commonly entrusted to the courts. For every special order, whether based on conditions peculiar to the individual instance or common to the general class to which it belongs, involves the determination that the concrete case falls within some general rule.

Shall the officers who exercise this power receive the immunity accorded to the judiciary?

The rule in favor of judicial officers is deemed necessary to protect them in the impartial performance of their duties, that they may render the decision they deem just and necessary, without fear of the consequences. It is urged that the same considerations apply to administrative officers in the exercise of what are often termed quasi-judicial functions.

In dismissing a suit against a meat inspector for the destruction of fish which the plaintiff alleged were not in fact unwholesome, the court said that the

"powers conferred are plainly and clearly judicial. . . . The officer exercising such a power is within the protection of that principle, that a judicial officer is not responsible in an action for damages to any one for any judgment he may render, however erroneously, negligently, ignorantly, corruptly, or maliciously he may act in rendering it, if he act within his jurisdiction." [16]

In a similar case against an officer for killing a horse which the lower court had found was not in fact afflicted with glanders, Judge Devens declared that the decision of the officer should nevertheless "be held conclusive, in order that the community may be protected, and that those entrusted with the execution of the law may safely assume the responsibilities imposed upon them." [17]

But this was in a dissenting opinion. And the former case has been overruled.[18] So that the broad doctrine enunciated is not law.

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[15] Little *v.* Barreme, 3 Cranch (U. S.) 170 (1804); Tracy *v.* Swartwout, 10 Pet. (U. S.) 80 (1836).

[16] Fath *v.* Koeppel, 72 Wis. 289 (1888).

[17] Miller *v.* Horton, 152 Mass. 540 (1891), *infra*, p. 448.

[18] Lowe *v.* Conroy, 120 Wis. 151 (1904).

In considering the liability of officers for the execution of their own decrees, a distinction is to be noted between two methods of administrative enforcement. It may be direct and immediate, without notice to persons affected, or else conditioned on non-compliance by the individual with some order specifically brought to his attention. In the former case, an action for damages affords the only access to the courts; in the latter, upon receipt of the order, a bill may be filed to restrain its execution. A denial of the injunction after a hearing settles the question of the characteristics of the property, and the doctrine of *res adjudicata* prevents the owner from offering evidence as to its condition in an action for damages against the officer.[19]

Where the owner neglects either to comply with the order or to file a bill to enjoin its enforcement, there are cases which on their facts sustain the proposition that in a subsequent action for damages, he cannot question the correctness of the administrative finding of fact on which the order and its execution are based. In Van Wormer *v.* The Mayor [20] the board of health tore down the house of the plaintiff after he had disregarded their order of removal. In the subsequent suit for damages it was held that evidence to show that there was in fact no nuisance was properly rejected, as that point "had been adjudicated by the proper tribunal, and was not in issue at the circuit." In Raymond *v.* Fish [21] the owner failed to remove certain brush as ordered, and it was destroyed by the board. Judgment was given in their favor, although the trial court had found expressly that the property destroyed was not the origin or a producing cause of disease.

There is thus authority which tends to establish that where administrative execution is merely a substitute for action required of the owner, a suit for damages against those who issue the order is not the proper proceeding in which to question the existence of the facts on which it is based. These decisions were based on broader grounds than that the plaintiff was barred by his failure to seek judicial relief in the interim between the receipt of the order and the invasion of his property.[22] But we may question

[19] Wheeler *et al. v.* City of Aberdeen *et al.*, 87 Pac. 1061 (Wash. 1906). But it was held error to dismiss the action, since it was open to the plaintiffs to show that the defendants had acted wantonly and beyond the necessities of the situation.

[20] 15 Wend. (N. Y.) 262 (1836).

[21] 51 Conn. 80 (1883).

[22] See *infra*, p. 451.

the broader principles enunciated, and yet sustain the decrees on the doctrine suggested. For it would seem a salutary rule which requires the owner to seek the aid of the courts before the mischief is done, and while the property is still in existence as a source of evidence, or else to be bound by the administrative determination. This affords to the officer the protection essential to efficient execution of the law, and withholds judicial relief from the owner only by reason of his prior laches.

Some have sought to sustain Raymond *v.* Fish and Van Wormer *v.* The Mayor, not on the ground that there was opportunity for a judicial hearing at some prior time, but on the theory that the owner's rights were adequately protected because he had been accorded a hearing before the administration.[23] In Van Wormer *v.* The Mayor the court seems to assume that under the statute a hearing was necessary, and finds that the statute had been substantially though not technically complied with. But in Raymond *v.* Fish no hearing seems to be necessary from such portions of the statute as are quoted in the opinion; and no mention of such necessity appears in the discussion of the court. And from the statement of facts it appeared that no hearing had been accorded as to the issue of the particular order of whose enforcement the plaintiff complained.[24] But the granting of a hearing before the issue of the order would seem to be immaterial, if the basis for denying judicial review in the action for damages is the prior opportunity to be heard in judicial proceedings before the order is carried into effect.

(4) *Administrative Execution.* — Such opportunity is of course foreclosed by execution not preceded by notice to the owner to take action himself. The question in such cases is squarely presented: is a judicial hearing necessary? No such requirement exists in respect to the accuracy of administrative ascertainments of value for purposes of taxation. Assessors are accorded the same immunity enjoyed by judicial officers. But in considering the analogy between judicial and administrative action, it is to be noted that in judicial proceedings due process inexorably requires notice and an opportunity to be heard. These are also prerequisite to the findings of assessors. But in the exercise of the police power,

[23] See *infra*, p. 451 *et seq.*

[24] See *infra*, p. 452.

notice and a hearing before the administration are often not essential. In such instances the analogy fails.

(a) *In absence of opportunity to be heard.* — The law is clear, therefore, that when a hearing has been impossible before either the administration or the courts, the officer who has destroyed property must establish in the suit for damages that it possessed the characteristics which he claims to have found, and that its condition justified his action.[25]

In Lowe *v.* Conroy[26] the Wisconsin court conceded the general principle announced previously in Fath *v.* Koeppel,[27] but added:

"The facts show that the respondent's private property rights have been unjustly invaded and that he is remediless in law unless those who did the trespass are liable. Under such circumstances the rule applies that even quasi-judicial officers may be subject to a personal liability, since the discretion in which such officers are protected must be limited to the line where their acts invade the private property rights of another, for which the law affords no redress other than an action against the one actually committing the trespass."

In Pearson *v.* Zehr[28] the court received the evidence of farmers and others not veterinarians, and sustained a judgment against members of the Board of Live Stock Commissioners for killing horses which the jury found did not in fact have glanders, saying that unless the fact of glanders exists, the slaughter is done without authority of law, although the board acted in good faith, had reasonable grounds for their belief, and had made an honest and careful investigation.

Thus it would seem that the opinions of experts may be outweighed by the conclusions of the untrained, and that those who endeavor honestly and carefully to perform the duties entrusted to them by law to protect the community against danger may be subject to the findings of a jury with respect to matters frequently arousing popular passion and prejudice hostile to the enforcement of the law.[29]

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[25] North American Cold Storage Co. *v.* Chicago, *infra*, p. 449; Miller *v.* Horton, *infra*, p. 448.

[26] 120 Wis. 151 (1904). [27] *Supra*, p. 444. [28] 138 Ill. 48 (1891).

[29] The hardships of such a rule and the consequent danger of lax and ineffective administration are mitigated in many jurisdictions by statutes placing on the public treasury the burden of the expense, in some instances even where the property destroyed is admittedly noxious.

The cases are based on two grounds: the limited jurisdiction vested in the administration; and the impossibility of interfering with property unless the owner has somehow, somewhere, the opportunity to offer evidence as to its condition.

The rule is universal that officers are personally liable for acts in excess of jurisdiction. The difficulty lies in ascertaining the jurisdictionary fact: fish, or unwholesome fish; horses, or horses with glanders. The cases have arisen in the absence of express statutory provision that the finding of the board should be conclusive. In Pearson *v.* Zehr the court declared that unless the fact of glanders exists, the slaughter is done without authority of law. In Miller *v.* Horton[80] the majority held that the statute gave no authority unless the horse in fact had glanders; and they proceeded on the not unusual assumption that the fact is necessarily what is determined to be true in judicial proceedings. The minority, on the other hand, were of opinion that the intention of the legislature was that the right of any agent the commissioners might employ should rest, not on the fact that the animal was actually affected with glanders, but on the administrative finding and condemnation.

This interpretation raises the question of constitutionality. The minority urged that the legislature might consider that self-protection required the immediate killing of all horses which a competent board deemed infected, whether they were so or not, and that innocent horses killed as a sacrifice to necessary self-protection need not be paid for. Judge Holmes answered vaguely enough that self-protection requires only what is actually necessary, and not all that may reasonably be believed to be necessary. But he added that on that point the court expressed no opinion, because in the actual case, actual necessity required only the destruction of infected horses, and that was all the legislature purported to authorize. His opinion was indicated, however, by the observation that

"had the statute declared in plain terms, that such healthy animals as should be killed by mistake for diseased ones would not be paid for, we should deem it a serious question whether such provision could be upheld."

[80] 152 Mass. 540 (1891).

Any possible dispute must be considered settled since the declaration of the Supreme Court that the statutes vesting power summarily to destroy food without giving the owner a chance to be heard as to its condition can be sustained only because the determination of the officials and the action taken thereon does not bind the owner as to the quality of the article destroyed, and that it remains open for him in a subsequent suit against the officials to introduce evidence of the actual condition of the food.[31]

It may therefore be taken as established that not even a statutory prohibition of judicial review would preclude the courts from examining the correctness of administrative findings in *ex parte* proceedings, where condemnation is followed by immediate and summary destruction.

But judicial censorship is applied with less severity to determinations resulting only in some temporary restraint of personal liberty or some minor interference with property. An officer is not liable in damages for removing a person afflicted with leprosy to a pest-house, although such action exceeds the necessities of the situation and would be enjoined.[32] It seems also that there would be no liability for removing one to a pest-house where the symptoms were not in fact those of a contagious disease. In Brown *v.* Purdy [33] it is said *obiter:*

"If there was any case for his judgment, or any fact of appearance or symptom as to which a question of small-pox or not could arise, his determination was final as to the legality or propriety of removal."

And in two recent cases, officers who confined to their homes and quarantined persons erroneously assumed to be afflicted with a contagious disease were held not personally liable in damages.[34] In the New Jersey decision there was invasion of property rights as well as of personal liberty, for the plaintiff complained of fumigation as well as restraint.

In Miller *v.* Horton the minority argued from an earlier decision which held that the legislature might order all imported rags to be disinfected, not because all were infected, but because the

[31] North American Cold Storage Co. *v.* Chicago, 211 U. S. 306 (1908). See 24 HARV L. REV. 336. [32] Kirk *v.* Wyman, 83 S. C. 372 (1909), *semble.*

[33] 8 N. Y. St. Reporter 143 (1886).

[34] Beeks *v.* Dickinson County *et al.*, 131 Iowa 244 (1906); Valentine *v.* Englewood, 76 N. J. L. 509 (1908), *infra*, p. 454.

danger was too great to permit of discrimination,[35] that it could make a similar order with respect to the killing of all horses which a respectable board should deem to be so infected. Judge Holmes answered by suggesting that there was an important distinction in degree at least, between regulating the precautions necessary to be taken in keeping property, and in ordering its destruction. And he had previously observed that difference of degree is one of the distinctions by which the right to exercise police power is determined.[36]

In other exercises of governmental power affecting property, the only administrative findings in *ex parte* proceedings held not subject to review are those adjudged to relate, not to the taking of property, but to the granting or denial of some privilege completely within the power of the government to confer or to withhold.[37] And in such instances there is usually opportunity to question the administrative decision in the courts and obtain relief on such other grounds as may be open, before the official action has produced irreparable injury.

(b) *After a hearing.* — When the owner cannot offer his evidence before the administration, he may offer it in the courts. Somewhere there must be a hearing. Frequently the administration grants a hearing. But the owner who is dissatisfied with its conclusions from the evidence presented may prefer to submit the evidence to court and jury.

Most statutes which permit summary execution without first giving the owner an opportunity to take action himself, provide also that the administrative decision may be reached upon inspection without hearing testimony. For the necessity which prohibits postponement of execution after action has been determined upon, will usually forbid the delay involved in granting a hearing before reaching a decision. Conversely, the statutes which require a hearing before reaching a conclusion usually permit administrative execution only in default of action by the owner. So that the decisions in suits for damages which have been assumed to deny the right of judicial review of conclusions of fact reached by an

[35] Train *v.* Boston Disinfecting Co., 144 Mass. 523 (1887).

[36] Rideout *v.* Knox, 148 Mass. 368 (1889).

[37] Buttfield *v.* Stranahan, 192 U. S. 470 (1904); Public Clearing House *v.* Coyne, 194 U. S. 497 (1904).

administrative body after a hearing are instances where notice to abate preceded the abatement of the administration.

This point, however, has not been noted by the courts; and some of the principles declared are broad enough to apply to administrative decisions executed without notice. With respect to *ex parte* determinations, the doctrine is clearly opposed to the overwhelming weight of authority. It remains to be inquired whether it obtains with respect to determinations reached after a hearing.

Van Wormer *v.* The Mayor [38] was not decided by the court of last resort, and the opinion cites no authorities. Its declaration that in an action of trespass evidence to show there was in fact no nuisance was properly rejected, must compete with a *dictum* of the Court of Appeals some sixty years later to the effect that "no decision of a board of health, *even if made on a hearing*, can conclude the owner upon the question of nuisance." [39]

In Raymond *v.* Fish [40] the court propounded this question:

"Does the statute confer upon the board of health the right to determine conclusively in any case what are nuisances and sources of filth which endanger the health of the inhabitants, so that if they act in good faith and merely err in judgment, the statute will justify the act done although the property of a third party may be destroyed?"

The affirmative answer is deduced by the reasoning that since any private citizen may abate what is in fact a nuisance which does him harm, if the statute gives the officers no additional protection it accomplishes nothing by its enactment. It was held, therefore, that the statute meant to give the board power to decide the matter conclusively in the apparent necessities of the case.[41] But the immunity accorded by the decision was confined to "seemingly extreme cases," where there is "reasonable ground to believe that immediate action is necessary" and "reasonable ground to believe the supposed nuisance to be one in fact."

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[38] *Supra*, p. 445.

[39] Health Department *v.* Trinity Church, 145 N. Y. 32 (1895). See 24 HARV. L. REV. 334.

[40] *Supra*, p. 445.

[41] "The statute does not mean to destroy property which is not in fact a nuisance, but who shall decide whether it is so? All legal investigations require time and cannot be thought of. If the board of health are to decide at their peril, they will not decide at all. . . . It would seem absolutely necessary to confer upon some constituted body the power to decide the matter conclusively, and to do it summarily, in order to accomplish the object the statute had in view. We think this has been done."

The decision does not purport to be based on the fact that a hearing was given. The discussion throughout the opinion is equally applicable to summary destruction without prior hearing. The positions taken seem squarely opposed to those advanced by the majority in Miller *v.* Horton.[42] The decisions are to be distinguished by the fact that in Raymond *v.* Fish the administrative execution was preceded by notice, rather than that before reaching the determination on which the execution was based a hearing was there accorded which was absent in Miller *v.* Horton. For the only hearing in Raymond *v.* Fish was on July 16 with respect to an order issued on August 15, and rescinded on August 24. On December 8 the board took up the matter again and voted to require owners to remove their brush before December 25. But plaintiff had no notice of this contemplated action and no knowledge of it until four days after it was taken. After September 1 the malady ceased to be epidemic; so that the owner, if granted a hearing as to the issue of the second order, would doubtless have urged other considerations than those presented five months previously. In Miller *v.* Horton the plaintiff knew of the examination of his horses, and notified those who came to kill them that surgeons employed by him had found no trace of glanders or other disease; whereupon action was postponed until after further consultation with the commissioners. But in that case the court looked not at what was actually done, but at what would have been permitted under the statute. So far as appears from such portions of the statute as are set forth in the opinion of Raymond *v.* Fish, the board, though required to notify the owner to abate within some time set, was not obliged to give him any opportunity to be heard before the issue of the order. In assessing property for taxation, a hearing must be given not as a matter of grace or favor, but must be a right secured by the statute.[43]

[42] *Supra*, p. 448.

[43] Stuart *v.* Palmer, 74 N. Y. 183 (1873). This case is cited in a *dictum* in People *v.* Board of Health, 142 N. Y. 1 (1893), to show that the same rule applies to exercises of the police power. The court observes that before a final and conclusive determination could be made as to the existence of a nuisance, "the party proceeded against must have a hearing not as a matter of favor, but as a matter of right, and the right to a hearing must be found in the act." The intimation that under such circumstances the administrative *fiat* could not be questioned, contrasts strangely with another observation in the same opinion to the effect that "if the decisions of these boards were final and conclusive, *even after a hearing*, the citizen would in many cases

The only authority cited in Raymond *v.* Fish for the point decided is a *dictum* in Salem *v.* Eastern R. R. Co.,[44] which suggested that though the determination is not conclusive in an action against the owner for the expense of abatement, the board to whom the determination was confided are protected by it and may safely rely upon its validity for their defense. But that case related to the alteration and improvement of property, not to its destruction; the statute under which the board acted made no provision for notice and hearing; and in Miller *v.* Horton, a later decision of the same court, the *dictum* was expressly disapproved.[45]

In Raymond *v.* Fish the constitutionality of the interpretation put upon the statute is asserted rather than discussed. In speaking of the common-law right of one assailed to kill in self-defense, though the apparent necessity is not an actual one, the court queries:

"If life may be protected by destroying life, when apparently necessary but not so in fact, may not life be protected by destroying property when apparently necessary though afterwards discovered not so in fact?"

This analogy seems hardly apposite. No health officer is put on trial for his life for murdering a horse or for destroying brush. The apparent necessity which in prosecutions for homicide relieves the slayer from criminal responsibility might not be deemed sufficient to excuse him from paying damages to the estate of the deceased for his error of judgment.

The reasoning employed in Beeks *v.* Dickinson County *et al.*,[46] which held a health officer immune from liability for having quarantined a person not in fact infected with a contagious disease, is likewise unsatisfactory. The court says:

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hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated and generally unfitted to discharge grave judicial functions." See 24 HARV. L. REV. 340.

[44] 98 Mass. 431 (1868).

[45] Judge Holmes says: "The remark is *obiter*, and it is doubtful perhaps, on reading the whole case, whether it means that the determination would protect them in an action for damages, where the statute provides no compensation for property taken which is not in fact a nuisance. To give it such effect as a judgment merely would be inconsistent with the point decided and with Brigham *v.* Fayerweather, 140 Mass. 11."

[46] 131 Iowa 244 (1906), *supra*, p. 449.

"It is the modern tendency of judicial opinion to hold that the public health is the highest law of the land. . . . This board of health was the creation of the statute and its paramount duty was to protect the public health; its duty then, was to the public and not to any individual member thereof, except to act honestly and without design to injure him. If a health officer fails to do his duty, no individual may complain, for the duty is public and the officer is not charged with any individual duty to any particular person. If there be no liability for an omission of public duty, it would seem to follow without question that an erroneous performance should not subject the officer to personal liability. It may, it is true, cause an injury to the individual, but it is not a wrong because the officer owes the individual no duty beyond what we have already stated." [47]

But the court blinds its eyes to the wide distinction between the absence of a positive duty to an individual with respect to some service that may be claimed only by the public, and the absence of the negative duty owed to all individuals by all individuals, whether private citizens or officers, not to invade legally protected rights.

But though present authority may not sustain the proposition that finality is to be accorded to administrative decisions whether certain property is obnoxious to the police power, the courts are tending towards sustaining legislative declarations to that effect.

In Valentine *v.* Englewood [48] the statute, as quoted in the opinion, provided that "no suits should be maintained against the board or its agents to recover damages for proceedings to abate and remove a cause of disease, unless it should be shown that the cause of disease did not exist, was not hazardous or prejudicial to the public health, and that the board acted without reasonable and probable cause to believe that such cause was in fact prejudicial and haz-

[47] The opinion puts strongly the argument of public necessity: "It is unfortunate that any individual should suffer loss because of a mistake as to the existence of a dangerous disease, and yet the welfare of the public is of such paramount importance that a rule should not be established which will have the necessary effect of increasing the public danger. If health officers, acting in perfect good faith and as their judgment dictates, are held liable for a mistake in judgment, the effect upon the public health cannot be doubted. . . . If civil liability is to be imposed because of a quarantine which is later proved unnecessary, the danger to the public will be greatly enhanced, and the effectiveness of the statute greatly impaired. We do not feel like announcing such a rule, nor do we believe justice to the individual requires it."

[48] 76 N. J. L. 509 (1908).

ardous to the public health." The language is susceptible of two interpretations. It might be argued that it indicates a distinction between the existence of a source of disease and the possibility of hazard from such source. A swamp with typhoid germs might be deemed a source of disease, and yet be so situated that it was not in fact hazardous. It would follow, then, that since the statute relates reasonable cause, not to the belief in the existence of the source of disease, but to the belief in the possibility of hazard, it means to allow suit even where a source of disease exists, if the plaintiff can establish "that the board acted without reasonable and probable cause to believe such cause was in fact prejudicial and hazardous to the public health." On the other hand, it may be urged that since the purpose of the statute was to limit, not to vest a right of action, and its language in specifying exceptions to the limitation on the right to sue is cumulative and not in the alternative, that it means to condition the right of the plaintiff not only on showing that no source of disease existed, but on establishing further that the board had no reasonable grounds to believe that the alleged source was in fact hazardous. Where the alleged source, if it existed, was necessarily hazardous, this would require him to show the absence of reasonable grounds for believing that the alleged source was one in fact.

In the case before the court, if any cause of disease existed, it was necessarily hazardous. Damages were sought for quarantining the plaintiff on the mistaken assumption that his daughter had scarlet fever. The trial judge had nonsuited the plaintiff, and the higher court conceded that his ruling could not be vindicated if the actual existence of the disease was essential to the justification of the defendants. The issue joined upon the pleadings was only whether there was reasonable and probable cause to believe that the symptoms were those of the disease, but the court said: "It would be taking too narrow a view of the case to decide it upon this question of pleading only. We prefer to rest the decision on broader grounds." Without analysis the statute was interpreted as follows:

"What our legislature has done in the Health Act is in substance to say that anything which may possibly be a cause of disease is subject to the regulations of the board of health, when that board has reasonable cause to believe that it is in fact a cause of disease. . . . The legislature has

itself undertaken in effect to make a nuisance of what the board of health shall, upon reasonable and probable cause, determine to be a cause of disease."

The statute thus construed was held to distinguish the case at bar from Miller *v.* Horton,[49] Lowe *v.* Conroy,[50] and Pearson *v.* Zehr.[51] Its constitutionality was sustained on the analogy of Train *v.* Boston Disinfecting Co.,[52] and the general principles of public welfare and necessity. After referring to decisions sustaining statutes requiring an eight-hour law for laborers, compelling vaccination, and declaring places where liquors are sold to be nuisances, the opinion says:

"These cases are but illustrations of the extent to which the highest tribunal has gone in vindication of the principle that the individual must yield somewhat of his personal rights to society in return for the benefits of society which he enjoys. We think it not unreasonable to require him in a case like the present to depend for redress upon the sense of justice of the public, rather than upon the right of action against public officers who have acted, as they thought, for the public weal in a matter of public duty."

Though the court distinguishes the case at bar from Miller *v.* Horton [53] by reason of the statute, it disagrees with the doctrine of the Massachusetts court that in the absence of any statute the board has no jurisdiction unless a cause of disease actually exists. It is said to be enough if the matter is colorably, though not really within their jurisdiction. With telling force Judge Swayze points out that Miller *v.* Horton and similar cases cannot be distinguished on the ground of excess of jurisdiction from the many instances in other exercises of governmental power, where administrative officials are held exempt from suit when called upon to act judicially.

"If a postmaster-general, or a postmaster or a collector of a port, or an assessor of taxes are to be immune when their error of judgment causes the loss of another's liberty or property, we think a board of health is entitled to a like immunity. A justice of the peace is immune if he acts in a matter colorably within his jurisdiction. The underlying reason is not the judicial character of the officer, but the judicial character of the act, and the public necessity that public agents engaged in

[49] *Supra*, p. 448. [50] *Supra*, p. 447. [51] *Supra*, p. 447.
[52] *Supra*, p. 450. [53] *Supra*, p. 448.

the performance of a public duty in obedience to the command of a statute, should not suffer personally for an error of judgment which the wisest and most circumspect cannot avoid."

It seems clear from the discussion in the opinion that the court would not have decided differently, had there been no statute limiting the right of action. For, in the endeavor to establish that the statute authorizing summary procedure and yet conferring immunity proffers due process of law under the Fourteenth Amendment, it says that due process does not always require notice and a hearing, and adds:

"Where the board of health is required to act upon an emergency, due process of law requires only that they should be liable to an action in case they act wrongfully; but the action to which they are liable is only such action as the law gives. In this case, the common law, as we have already shown, gave no right of action if the matter upon which the board decided was colorably within its jurisdiction. The object of the Fourteenth Amendment was not to give the parties remedies which did not exist at common law, but to protect them against hostile action by the state depriving them of existing remedies."

It seems to smack somewhat of casuistry to say that a statute purporting to limit a right of action does not do so, but merely enlarges the jurisdiction of an officer, and in another part of the opinion to insist that the statute limiting the right of action distinguishes the case at bar from the precedents where no such statute was present.

Though the plaintiff in Valentine *v.* Englewood, as in Miller *v.* Horton, had been permitted to present the opinions of experts called by him before the board took its action, this was a matter of favor and not of right; and the court regards the action taken as though no hearing had been accorded. From this aspect it is hardly sound in saying that the statement of the Supreme Court that whether assessors shall be held liable for an unlawful assessment if within their jurisdiction is a matter of general municipal law and raises no federal question, is an authority for the proposition that a statute authorizing such exemption in a case like the one at bar does not contravene the Fourteenth Amendment. For the Supreme Court has indicated very clearly that a statute authorizing the summary destruction of property as a police measure

would be invalid under the Fourteenth Amendment, but for the fact that the owner could have a judicial determination as to its condition in an action for damages against the officer.[54] The statute in the present case can escape from the principle of that decision only because the invasion of liberty and property is temporary and inconsequential when compared with the public danger to be averted.

The opinion in Valentine *v.* Englewood, though given in a case involving only slight interference with property and personal liberty, where the consequences of excess of caution would be far more serious than those of excess of zeal, clearly points the way to an extension of the immunity hitherto accorded to administrative officials in taking measures to safeguard the public health. The advancing trend of judicial opinion is gradually forsaking the individualistic doctrines underlying the precedents of an earlier generation, and demonstrating the truth of the maxim of Mr. Justice Holmes in his lectures on The Common Law that the "life of the law is not logic but experience," or affording illustration for the tenets of that school of philosophy which urges that the only sound logic is the logic of experience.

The decrees of the courts, however, still lag behind the utterances of the opinions. The immunity of officials for acts done in enforcing the police power cannot yet be said to be established except where the interference is with personal liberty rather than with property, or where the interference with property falls short of destruction, or is not executed until the individual has been given an opportunity to take action himself and thus enabled by prompt action to secure judicial relief in some other proceeding. But it may reasonably be expected that the immunity will some day be extended to cases where the individual has been able as a matter of right to urge before the administration his claims to freedom from interference. At present, however, the courts seem still convinced that when property is destroyed in the exercise of the police power the owner must have somewhere in judicial proceedings the opportunity to offer evidence as to its condition. The Chancellor and the jury are regarded as best suited to determine finally the disputed question of fact. And thus indirectly the community is being forced to assume the burden of loss,[55] thereby relieving

[54] North American Cold Storage Co. *v.* Chicago, 211 U. S. 306 (1908), *supra*, p. 449.

[55] See *supra*, p. 447, note 29.

both the owners who are without fault and the administrative authorities who may make mistakes in the honest endeavor to perform the duties entrusted to them by law. The same solution of the vexed problem is suggested by the courts in the instances where the burden is now placed on the owner rather than on the administrative official.[56]

Judge Holmes, in Miller *v.* Horton, doubted the constitutionality of a statute which should "declare in plain terms, that such healthy animals as should be killed by mistake for diseased ones, should not be paid for." Probably no statute would announce bluntly that an officer should not be liable for destroying property erroneously declared injurious, even after a hearing. But in some such language as that employed by the statute in Valentine *v.* Englewood it might accord finality to the determination of an expert body, in spite of the contrary finding of twelve other men who composed the jury in a suit for damages.

Much confusion is due to the nebulous purport of the word *fact.* Judicial interpretation invariably identifies it with something determined to be true in judicial proceedings. A contrary notion sometimes prevails among those who suffer from the findings of blundering juries. The truth in these matters is not capable of absolute mathematical demonstration. We must accept as final the opinion of some designated fallible human beings. A jury is as prone to error as an expert body.

In other exercises of governmental power, finality is accorded to administrative determinations based on the consideration of evidence submitted by those whose interests are involved. A tax paid on property actually worth twenty thousand dollars but erroneously valued at twice that amount cannot be recovered. The loss may be greater than the value of a horse or a steer. It is thought that the welfare of collective society is promoted by vesting the power of final decision in administrative officials. The rule may come in time to be applied to the exercise of the police power, whenever the courts conclude that this collective advantage outweighs the possible injury to individuals who insist that the administration has acted erroneously.

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[56] *Supra*, p. 456.

THE DOCTRINE OF DUE PROCESS OF LAW BEFORE THE CIVIL WAR.

[*Continued.*]

IV.

IT was not destined, therefore, that the doctrine of due process of law should enter the general constitutional jurisprudence of the United States through the Supreme Court of Alabama. Some court more zealous for private rights must be the one to receive the torch from the North Carolina court, and indeed one more generally conspicuous in the world of citation and precedent than either of the Southern courts. At the same time, the final fate of *Ex parte* Dorsey teaches us the character of the exigency that would force such a tribunal as the one described to take up with the doctrine of due process of law, namely, the advance of Iredell's doctrine of the plenary power of the legislature within the written constitution and the consequent gradual retirement into disuse of constitutional limitations based upon extra-constitutional grounds.

The accession of Taney to the Chief Justiceship of the Supreme Court marks an epoch in the history of American constitutional law, though perhaps somewhat less distinctly than is often supposed.[72] Marshall's guiding notion with respect to the national Constitution was, that it was intended to provide a realm of national rights subject to national control, a point of view from which state legislation limiting individual action became impertinence. Had the political branches of the national government been of Marshall's way of thinking all along, and willing, therefore, to assert the necessary degree of national control, perhaps this theory would have worked out very well even at that period. With the election of Jackson, however, the doctrine of States' Rights and strict construction laid a paralyzing hand upon the sources of national power. On the other hand, at the very same moment, what with the revival of revolution abroad and the rise of transcendentalism

[72] See Marshall in Wilson *v.* Blackbird Creek Marsh Co., 2 Pet. (U. S.) 245; and in Providence Bank *v.* Billings, 4 Pet. (U. S.) 514, 563.

at home, and last, but not least, the phenomenal success of the Erie Canal, the demand went forth for a large governmental programme: for the public construction of canals and railroads, for free schools, for laws regulating the professions, for anti-liquor legislation, for universal suffrage and for the abolition of slavery. I say "governmental programme," but what government? Necessarily the state governments, which must, therefore, be furnished with the adequate constitutional theory to carry it forward. It is true that the panic of 1837 struck off the first item of this programme, but, save in a way presently indicated, it does not seem to have affected permanently the development of constitutional theory. Taney became Chief Justice in 1836, bringing with him to the Supreme Bench the fixed intention of clothing the states, so far as a faithful adherence to precedent would allow, with the sovereign and complete right to enact useful legislation for their respective populations. In his great Charles River Bridge [73] decision, accordingly, Taney laid down the maxim that in a public grant nothing passes by implication, a doctrine which, as Story showed conclusively in his dissent, would have made the decision in the Dartmouth College case originally impossible, and which did in point of fact, in the decades following, pave the way for the great but necessary curtailment of the efficacy of that decision.[74] Again, in the License Cases,[75] Taney reveals his point of view by refusing to extend to the field of interstate commerce the principle of Marshall's decision in Brown *v.* Maryland [76] with reference to Congress' power over foreign commerce, namely, that that power is exclusive, and this Taney did in the very face of Marshall's *dictum* to the contrary. Finally, in this and in other opinions and decisions Taney diluted Marshall's doctrine of the paramountcy of national power within the sphere of its competence with the doctrine of the reserved sovereignty of the states, whereby he meant not merely that the states have left to them certain powers in consequence of their not being granted to the national government, which is all that the Tenth Amendment

[73] 11 Pet. (U. S.) 420 (1837).

[74] See particularly West River Bridge Co. *v.* Dix, 6 How. (U. S.) 507; Beer Co. *v.* Massachusetts, 97 U. S. 25; Fertilizing Co. *v.* Hyde Park, *ibid.* 659; Stone *v.* Mississippi, 101 U. S. 814, and Butchers Union Co. *v.* Crescent City Co., 111 U. S. 746; also see Murray *v.* Charleston, 96 U. S. 432.

[75] 5 How. (U. S.) 504 (1846).

[76] 12 Wheat. (U. S.) 419 (1827).

says, but that the states had an area of power which was positively reserved to them and which therefore no legitimate exercise of federal power could ever invade.[77]

But what was happening on the Supreme Bench was the index of what was happening also in the state judiciaries, where popular sovereignty and states' rights united to force a recognition of the plenitude of legislative power. One illustration of this I have already referred to, the disavowal by Ormond, J., of the Alabama Supreme Court in 1841 of his own line of reasoning of three years earlier. The case referred to was that of Mobile *v.* Yuille,[78] in which the question was the power of the legislature to authorize a municipality to regulate the weight and price of bread. The attorney for defendant in error was the reporter of *Ex parte* Dorsey, who, upon the basis particularly of Justice Ormond's opinion in that case, now "strenuously contended" "that no such power exists because [as he contends] it would interfere with the right of a citizen to pursue his lawful trade or calling in the mode his judgment might dictate," and also because such by-laws, being in restraint of trade, are void under the common law. But, rejoined Ormond, J., sweeping aside defendant's interpretation of *Ex parte* Dorsey, "in this case the power is expressly given by the statute to do the act complained of," wherefore what the common law ordains is not in point. For the rest,

> "the legislature having full power to pass such laws as is [*sic*] deemed necessary for the public good, their acts cannot be impeached on the ground that they are unwise or not in accordance with just and enlightened views of political economy, as understood at the present day . . . arguments against their policy must be addressed to the legislative departments of government."

Mobile *v.* Yuille, however, is a comparatively late case, and more than a decade earlier, some years even before Taney had become Chief Justice, a similar doctrine was struggling for recognition in the New York courts, whose dilemma, comprising as it did the tradition of judicial review created by Kent on the one hand, and the victorious principles of Jacksonian Democracy on the other, if it

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[77] See particularly the Chief Justice's opinions in Groves *v.* Slaughter, 15 Pet. (U. S.) 449, and Pollard *v.* Hagan's Lessee, 3 How. (U. S.) 212.

[78] 3 Ala. 137 (1841). See also State *v.* Maxey, 1 McMul. (S. C.) 501 (1837).

was rather painful, was also of the greatest possible importance in connection with the history of due process of law.[79] For the problem before the New York courts, from 1830 on, was precisely the problem that had confronted the North Carolina court a quarter-century earlier, namely, the problem of reconciling an adequate supervision over legislative power with due deference to the principle of legislative sovereignty within the written constitution. Naturally the North Carolina solution of this difficult problem seemed much to the point.

More specifically, the situation that confronted the New York courts was this: the power of eminent domain is rather the most invidious branch of governmental authority, even when exercised by the state directly. Within a very few years, however, hundreds and hundreds of private corporations organized for the business of transportation had been endowed by the state with this power. Kent's doctrine of consequential damages and the resultant blending, at their outer edges, of the police power and that of eminent domain, had already gone by the board in 1827 in the cases of Vanderbilt *v.* Adams [80] and Stuyvesant *v.* New York.[81] Kent's other doctrine, that the power of eminent domain is exercisable for a public purpose only, that is to say, for what the courts may regard as a public purpose, was also in grave danger of extinction, being first rested, by Chancellor Walworth, upon the untenable basis of the Obligation of Contracts clause of the federal Constitution [82] and then transferred again to its original position upon the doctrine of "natural rights" and the "spirit of the constitution." [83] But the doctrine of natural rights no longer sufficed either. What, then, was to be done? In Taylor *v.* Porter [84] an act author-

[79] For an excellent illustration of the difficulty created by the dilemma referred to, read Justice Nelson's opinion in People *v.* Morris, 13 Wend. (N. Y.) 329 (1835).

[80] 7 Cowen (N. Y.) 349.

[81] *Ibid.* 585. For the derivation of the doctrine of these cases from the common law, see 12 Mass. 220 (1815) and 1 Pick. (Mass.) 417 (1823), decisions which Kent pronounces "erroneous." 2 Comm. 339, note c. See also in condemnation of the same doctrine, Story, J., in his dissent in the Charles River Bridge Case, 11 Pet. (U. S.) 638, 641. See also Baker *v.* Boston, 12 Pick. (Mass.) 184 (1831), in which the doctrine of 7 Cow. (N. Y.) 349 and 585 is applied.

[82] Beekman *v.* Saratoga, etc. R. R., 3 Paige (N. Y.) 45 (1831).

[83] Albany Street Matter, 11 Wend. (N. Y.) 149 (1834); Bloodgood *v.* Mohawk, etc. R. R., 18 Wend. (N. Y.) 1 (1837).

[84] 4 Hill (N. Y.) 140; preceded, in 1839, by the Matter of John and Cherry Sts., 19 Wend. (N. Y.) 676. Besides the fact that the line of argument is more clearly cut

izing a private road under the eminent domain power was under review. The act was overturned; and Bronson, J., speaking for the majority of the court, annexed the doctrine of natural rights and of limitations inherent to legislative power to the written constitution by casting around that doctrine the phrase "law of the land" and the phrase "due process of law," which had also since 1821 been a part of the New York constitution.

Justice Bronson's line of argument is most instructive. Setting out with the proposition that the people alone are absolutely sovereign, he follows it up with the assertion that the legislature can exercise only such powers as have been delegated it, which is evidently either a restatement of the doctrine of limitations inherent to legislative power or an assertion that a state constitution, like the federal Constitution, is a grant of powers. Quotations from Story's opinion in Wilkinson *v.* Leland [85] make it evident that it is the former, as does also the invocation of the social compact at this point. But it is a phrase of the written constitution that Bronson, J., is in particular search of. Fortunately the decision in Hoke *v.* Henderson is at hand, recommended by Kent in a recent edition of his Commentaries as "replete with sound constitutional doctrines." On the strength of Hoke *v.* Henderson, accordingly, "law of the land" is asserted to mean that before a man can be deprived of his property "it must be ascertained judicially that he has forfeited his privileges, or that someone else has a superior title to the property he possesses." But if there is doubt as to the meaning of the phrase "law of the land," at least there can be none as to that of "due process of law" of the same article of the constitution; for this means nothing "less than a proceeding or suit instituted and conducted according to prescribed forms and solemnities for ascertaining guilt or determining the title to property." One exception to this definition is indeed furnished by the case of an exercise of the power of eminent domain, when due process of law means due compensation. The eminent domain power, however, can be exercised only for a public purpose. But who is to

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in Taylor *v.* Porter, citation also makes it the more important case by far. *Cf.* Harvey *v.* Thomas, 10 Watts (Pa.) 63, and the Pacopson Rd. Case, 16 Pa. St. 15 (1851). For Kent's view of Hoke *v.* Henderson, quoted immediately below, see 2 Comm. (Ed. of 1840) 13, note *b*.

[85] 2 Pet. (U. S.) 657 (1829).

ascertain whether a given purpose is a public one or not? Justice Bronson's evident assumption — and it is only assumption — is that it is the courts, as preliminary to their task of determining whether due process of law has been observed. Nelson, J., dissented; at the same time, however, he accepted the general principle of the decision, but confessed that he was uncertain as to what grounds it rested upon.

Taylor *v.* Porter, on account of the special character of the enactment there reviewed, is to be classified with University of North Carolina *v.* Foy. It was followed in 1849 by White *v.* White,[86] in which a general statute was pronounced void and which therefore stands very closely coincident with Hoke *v.* Henderson. The statute in question removed the disability of married women under the common law in the control of their property. As an exercise of legislative power it was closely analogous to the statutes enacted early in our national history abolishing the right of primogeniture, statutes which, as we have seen, received enforcement even against rights of succession vested at the time of their passage. But the *virus* of natural law had spread since those days. In the first case, Holmes *v.* Holmes,[87] in which the Married Women's Act is challenged successfully, the decision was put upon the Obligation of Contract clause of the federal Constitution. But Mason, J., who decided White *v.* White, was very justifiably sceptical of the reasoning by which this result was attained. He accordingly decided to avail himself of the Due Process of Law clause and the doctrine of natural rights, citing the Albany Street case, Wilkinson *v.* Leland, and Taylor *v.* Porter indifferently. Eventually this decision also was superseded by decisions upholding the Married Women's Act but confining its operation to property acquired subsequently to the passage of the act. The cases in question were those of Perkins *v.* Cottrell [88] and Westervelt *v.* Gregg,[89] in the former of which the decision was based upon the doctrine of vested rights, the Obligation of Contracts clause of the federal Constitution, and the "spirit of the constitution which declares" that no

[86] 5 Barb. (N. Y.) 474.

[87] 4 Barb. (N. Y.) 295.

[88] 15 Barb. (N. Y.) 446 (1851).

[89] 12 N. Y. 209 (1854). See also the case of Powers *v.* Bergen, 6 N. Y. 358, in which use is made of the Law of the Land clause of the Constitution to overturn a special act of legislation.

person shall be deprived of life, liberty or property without due process of law; and in the latter, explicitly upon the Due Process of Law clause: "such an act as the legislature may, in the uncontrolled exercise of its power, see fit to pass, is in no sense," said the court, "the due process of law designated by the constitution." Similar acts were similarly construed in other states, but generally upon the ground that their prospective operation had been plainly intended by the legislature itself.[90]

V.

And thus by adopting the North Carolina doctrine of "law of the land" *pro tanto*, the New York courts, in 1843, rescued from disuse the doctrine of public purpose in connection with the power of eminent domain, and ten years later succeeded in drawing the teeth of the Married Women's Property Act. The real tussle with the reforming tendencies of the period was, however, yet to come. During the decade 1846 to 1856 no fewer than sixteen states passed anti-liquor laws of a more or less drastic character. Never since the doctrine of vested rights had been formulated had such reprehensible legislation, from the standpoint of that doctrine, been enrolled upon the statute books. How was it to be withstood? Some of the earlier of these laws took the form of local option measures, and to meet these a new dogma of constitutional law, drawn originally from John Locke's Second Treatise on Civil Government, was invented, namely, the doctrine that the legislature cannot delegate its power, — an utterly absurd doctrine, at least in this application of it, and one which was in singular contradiction both with legislative practice anterior to 1846, and with judicial decision.[91]

[90] *Cf.* 24 Ala. 386 (1854); 43 Ill. 52 (1857); 28 N. J. L. 219 (1860); 20 Oh. St. 128; with 34 Me. 148 (1852), and 8 Fla. 107 (1858); in the latter two cases the doctrine of vested rights plays its part.

[91] The courts to whose fertility of mind is due this doctrine were those of Delaware and Pennsylvania. See Rice *v.* Foster, 4 Harr. (Del.) 479 (1847), and Parker *v.* Commonwealth, 6 Pa. St. 507 (1847). The doctrine is refuted in People *v.* Reynolds, 10 Gilman (Ill.) (1848), and in Bull *et al. v.* Read, 13 Gratt. (Va.) 78 (1855). Also in Johnson *v.* Rich, 9 Barb. (N. Y.) 680 (1848), with which however *cf.* Barto *v.* Himrod, 8 N. Y. 483. For the contradictory position of the Delaware and Pennsylvania courts *cf.* Rice *v.* Foster with 3 Harr. (Del.) 335 and 4 Harr. (Del.) 82; and Parker *v.* Commonwealth with 8 Barr (Pa.) 391 and 10 Barr (Pa.) 214. The Pennsylvania court subsequently abandoned the dogma, in connection with local option legislation, in Locke's

Furthermore, as was immediately shown, it was generally an utterly futile doctrine; for the easy retort of the reforming legislatures was state-wide prohibition.

Such a law was enacted by the New York legislature in 1855. It forbade all owners of intoxicating liquors to sell them under any conditions save for medicinal purposes, forbade them further to store such liquors when not designed for sale in any place but a dwelling house, made the violation of these prohibitions a misdemeanor, and denounced the offending liquors as nuisances and ordained their destruction by summary process. In the great case of Wynehamer *v.* State of New York,[92] which comprises a new starting point in the history of due process of law, this act was overturned, the essential ground of the decision being that the harsh operation of the statute upon liquors in existence at the time of its going into effect comprised an act of destruction not within the power of government to perform, "*even by the forms which belong to due process of law.*" [93] The significance of this statement of the matter is this: in every previous case of due process of law the court had had its opportunity in treating a civil enactment as, in certain applications, a bill of pains and penalties. In Wynehamer *v.* State of New York, however, the court was confronted with a frankly penal statute which provided a procedure, for the most part unexceptionable, for its enforcement. That statute was none the less overturned under the Due Process of Law clause, which was thereby plainly made to prohibit, regardless of the matter of procedure, a certain kind and degree of exertion of legislative power altogether. The result is obvious, even if somewhat startling, and it serves to bring into strong light once more the dependence of the derived notion of due process of law upon extra-constitutional principles; for it is nothing less than the elimination of the very

Appeal, 72 Pa. St. 491. For a very early Pennsylvania case in which the doctrine was offered to the court but ignored, see 2 Yeates (Pa.) 493 (1799); a later Massachusetts case in which the same idea was brought forward but specifically repelled by the court, is that of Wales *v.* Belcher, 3 Pick. (Mass.) 508 (1827). The immediate responsibility for this absurdity must fall to Gibson, C. J., in which connection see 5 W. & S. (Pa.) 281 (1843). The passage from Locke's work is § 141. On the history of the referendum, see E. P. Oberholtzer, Referendum in America.

[92] 13 N. Y. 378 (1856).

[93] A. S. Johnson, J., 420: "The legislature cannot make the mere existence of the rights secured the occasion of depriving a person of them even by the forms which belong to 'due process of law.'"

phrase under construction from the constitutional clause in which it occurs. The main proposition of the decision in the Wynehamer case is that the legislature cannot destroy by any method whatever what by previous law was property. But why not? To all intents and purposes the answer of the court is simply that "no person shall be deprived of life, liberty or property."

But how can the elimination of the phrase "due process of law" from the constitutional clause be regarded as furnishing a new starting point in the history of the development of that clause? The answer is that from now on the attention of the courts is drawn to the other words of the clause; more particularly to the words "liberty" and "property" and the word "deprive." Indeed the attention is seen to shift to these terms on this very occasion, in the case of the dissenting opinion of T. A. Johnson, J., who bases his argument against the decision partly upon his construction of the word "deprived" and partly upon a *reductio ad absurdum* involving the term "liberty." The word "deprive," he contends, is used in the constitutional clause,

"in its ordinary and popular sense, and relates simply to divesting of, forfeiting, alienating, taking away property. It applies to property in the same sense that it does to life and liberty and no other. . . . When a person is deprived of his property by due process of law the thing itself . . . with the legal title is taken away. . . . The act itself does indeed . . . directly provide for depriving the owner of his property by forfeiture and destruction, but that is where it is kept for an unlawful purpose and after trial and judgment. That provision has no bearing upon the question under consideration. When property is taken from the owner and destroyed, he is deprived of it by virtue of the act, not before. It might be urged with precisely the same pertinency and force, that a statute which prohibits certain vicious actions and declares them criminal deprives persons of their liberty and is therefore in derogation of the constitution."

Undoubtedly Johnson, J., reveals a grave danger attending the decision he is criticizing. For the moment the danger was not practically serious on account of the conservative view taken by the court of "property," which is defined by implication as the valuable use of the thing possessed. But let "property" come to mean — as indeed it does in this very case with one or two of the judges — any particular item of such right, for example, the right

of sale; let "liberty" be made to signify the rights which one enjoys in the community under the standing law, and the decision in this case, together with the distinction between regulation and destruction upon which it is based, becomes immediately untenable and a new solution of the eternal issue between legislative sovereignty and private rights at once imperative. But what line is this solution to take? Must outright choice be made between, on the one hand, allowing the legislature to destroy or even to regulate at discretion or, on the other hand, absolutely tying the hands of the legislature as in Hoke *v.* Henderson? Or is there a midway course? By construing the word "deprive," Johnson J., pointed the way, though no doubt unintentionally, to such a midway course and so provided an escape from the difficulty which it was his purpose merely to expose.

But at another point also is the Wynehamer decision a starting point. As we have just seen, the decision rests upon an alleged distinction between regulation and destruction: but are regulation and destruction two such different things, or is the latter often merely consequential upon the former? Common sense inclines to the latter view. Yet admit this view and what becomes of Marshall's famous maxim, that "questions of power do not depend upon the degree to which it is exercised?" In this connection a remark of Comstock, J., becomes of greatest significance in view of modern developments. "We," he contends, "must be allowed to know what is known by all persons of common intelligence, that intoxicating liquors are produced for sale and consumption as a beverage. . . ." Here is the first assertion of that doctrine of "judicial cognizance" which lies at the very basis of the modern flexible idea of "due process of law." [94] Questions of power do to-day emphatically depend upon the degree to which it is exercised, and this because the courts are able to take cognizance of facts which make different degrees of power harmonious with the "due process of law" requirement in different cases.

The last feature of the Wynehamer decision that I desire to call attention to is the fact that by it the New York Court of Appeals finally dismisses the doctrine of natural rights from the firing line as a defender of property. The ungracious task falls to Com-

[94] See the Lochner case, *supra*; also *In re* Jacobs, 98 N. Y. 98 (1885). *Cf.* Powell *v.* Pennsylvania, 127 U. S. 678 (1887).

stock, J., whose opinion heads the others, and he performs it with great considerateness. He says:

"It has been urged upon us that the power of the legislature is restricted not only by the express provisions of the written constitution but by limitations implied from the nature and form of our government; that aside from all special restrictions the right to enact such laws is not among the delegated powers of the legislature, and that the act in question is void as against the fundamental principles of liberty and against common reason and natural rights."

Moreover, he admits that "high authority has been cited" for these views, and himself quotes at length from Justice Chase's opinion in Calder *v.* Bull, which quotation he follows up with citations of Fletcher *v.* Peck, Dash *v.* Van Kleek, and Taylor *v.* Porter. He then proceeds to furnish us with his own point of view in the following words:

"I entertain no doubt that, aside from the special limitations of the constitution, the legislature cannot exercise powers which are in their nature essentially judicial or executive. These are by the constitution distributed to the other departments of the government. It is only 'legislative power' which is vested in the Senate and Assembly. But where the constitution is silent and there is no clear usurpation of the powers distributed to the other departments, I think there would be great difficulty and great danger in attempting to define the limits of this power. Chief Justice Marshall said [Fletcher *v.* Peck]: 'how far the power of giving the law may involve every other power in cases where the constitution is silent never has been and perhaps never can be definitely stated.' That very eminent judge felt the difficulty; but the danger was less apparent then than it is now when theories, alleged to be founded in natural reason and inalienable rights, but subversive of the just and necessary powers of government attract the belief of considerable classes of men, and when too much reverence for government and law is certainly among the least of the perils to which our institutions are exposed. I am reluctant to enter upon this field of inquiry, satisfied as I am that no rule can be laid down in terms which may not contain the germs of great mischief to society, by giving to private opinion and speculation a license to oppose themselves to the just and legitimate powers of government. Nor is it necessary to push our inquiries in the direction indicated. There is no process of reasoning by which it can be demonstrated that the 'act for the prevention of intemperance, pauperism and crime,' is void upon principles and theories

outside the constitution, which will not also and by an easier deduction, bring it in direct conflict with the constitution itself."

This surely is a remarkable passage betwixt the Scylla and Charybdis of tweedle-dee and tweedle-dum. What it all comes to is this: Comstock, J., dismayed by the abolitionists' quoting the same scripture to their purpose, refuses to annex the doctrine of natural rights to the written constitution, save only as a protection of property rights, that is to say, of vested rights; and generally speaking, this is always the significance of the doctrine of due process of law.

VI.

But now let us inquire how the doctrine of the Wynehamer decision accorded with the general constitutional law of the period. Within a year or two either side of the New York case similar cases involving similar questions arose in an even dozen states, and in all these states, save one, laws very closely analogous to the New York statute, or indeed sometimes more drastic in their provisions than that statute, were sustained. With reference to these cases two facts of foremost importance immediately present themselves. The first is that in only one case, and that occurring subsequently to the New York decision, is any argument against the body of the statutes under review based upon the Due Process of Law, or Law of the Land clauses of the constitution involved. The second is that the decisions, save in two or three instances, are based upon views of the police power which leave the definition of that power essentially to legislative discretion. Both these facts demand illustration from the cases themselves.

In State *v.* Noyes,[95] a New Hampshire case, a municipal ordinance pronouncing bowling alleys a nuisance and discontinuing those in existence was under review. The constitutional question raised is precisely the same as that raised by the provision of the New York statute which pronounced existing stocks of liquors nuisances. The attorney for Noyes urged that the question of what is a nuisance is a question of law and therefore for the courts. But, said the court, we have the law before us.

[95] 10 Foster (N. H.) 279 (1855). See also *ibid.* 286, also 289.

"The legislature do not exceed their legitimate authority when they make a change of laws and constitute that an offense which was not such before. . . . There may be an apparent unfitness sometimes in such legislation, but its validity has never been questioned."

In all the other cases the statutes involved were anti-liquor enactments, the arguments against which were based either — though but timidly on account of the attitude of the United States Supreme Court — on the Commerce clause of the federal Constitution or on the doctrine of natural rights. The latter argument was used in Beebe *v.* State,[96] an Indiana case, and the statute was overturned, Perkins, J., holding in a remarkable opinion that the right to manufacture, the right to sell, and the right to drink, spirituous liquors were inalienable rights. This decision, however, accompanied as it was by a well-argued dissent, marked the exception to the rule. In Lincoln *v.* Smith,[97] a Vermont case, a similar line of argument was taken by attorneys but was decisively rejected by the court. "Every member of society," runs the first article of the Vermont Bill of Rights, "hath a right to be protected in the enjoyment of life, liberty and property." But said the court in comment, "We do not well see how it can be claimed that the act in question is a violation" of this article, "unless it be assumed that the law is invalid, which is the very thing in question." Natural rights, the court continues, are subject to the civil law, and quotes Blackstone to the effect that certain rights are "absolute and inherent" and "without any control or limitation save only by the laws of the land." But the statute under review is law of the land unless invalid. The court proceeds to point out,

"The right to life, liberty, and property are all placed in the same connection; and certainly the two former are as sacred as the latter; although they have not seemed at all times to have called out the same legal acumen in their behalf as the latter."

Of similar purport is the decision of the Supreme Court of Illinois in Goddard *v.* Jacksonville.[98] Natural rights are surrendered or modified upon entering into the social compact. This surrender and modification, such as are indispensable to good government and the wellbeing of society, are comprehended under the police power of the government. "The framers of *Magna Carta* and of the

[96] 6 Ind. 501 (1855). [97] 27 Vt. 328 (1854). [98] 15 Ill. 589 (1854).

constitutions of the United States and of the states never intended to modify, abridge, or destroy the police powers of government. They only prohibited its exercise by *ex post facto* laws and regulated the mode of trial for offenses." Finally, the court argues, the police power must be recognized as a developing power, a power which unfolds with the increasing complexity of society and the advance of social needs. These decisions belong to the years 1854 and 1855. That of State *v.* Gallagher,[99] however, in which the Michigan Supreme Court defines legislative power even more broadly if possible, was rendered in 1856 and some weeks after the Wynehamer decision. The attorneys for Gallagher based their argument both upon the doctrine of natural rights and the derived doctrine, that the legislature has only "legislative power," of which it is therefore for the court to prescribe the limits. The court rejects both arguments. The opinion runs:

"The whole sovereignty of the people is conferred upon the different departments of government; what the judiciary and executive have not would seem from necessity to have been granted to the other; and that other must possess all the powers of a sovereign state except such as are withheld by the state constitution and such as are conceded to the general government. In that grant there are many powers that are not strictly legislative and which are essential to administrative government. If this department is limited as a law-making power, what is the limitation upon the exercise of those powers strictly administrative? . . . It must be conceded there is none."

But let us consider more particularly the attitude revealed by the courts in these decisions toward due process of law. A good illustrative case anterior to the Wynehamer decision is the Massachusetts case of Fisher *v.* McGirr.[100] Said Shaw, C. J., in his decision:

"We have no doubt that it is competent for the legislature to declare the possession of certain articles of property, either absolutely or when held in particular places and under particular circumstances, to be unlawful because they would be injurious, dangerous, and noxious; and by due process of law, by proceedings *in rem*, to provide both for the abatement of the nuisance and the punishment of the offender, by the

[99] 4 Gibbs (Mich.) 244 (1856). See also 3 Gibbs (Mich.) 330 (1854).
[100] 1 Gray (Mass.) 1 (1854).

seizure and confiscation of the property, by the removal, sale, or destruction of the noxious article."

Still more in point, however, is the language of the opinions in State *v.* Paul [101] and State *v.* Keeran,[102] which the Rhode Island Supreme Court decided with the Wynehamer decision before it and indeed with particular animadversion to that decision. With reference to attorney's argument based upon the derived view of the Law of the Land clause, the court said:

"It is obvious that the objection confounds the power of the assembly to create and define an offense with the rights of the accused to trial by jury and due process of law . . . before he can be convicted of it."

Later the court enters protest against —

"the loose habit of taking constitutional clauses, which from their history and obvious purpose have a well defined meaning, away from all their natural connections, and by drawing remote inferences from them, of pressing them into the service of any constitutional objection which the ingenuity or fancy of the objector may contrive or suggest," —

a practice which has gone far, it thinks, to bring constitutional questions into "jest and ridicule." But surely, it continues,

"if any clause in the constitution has a definite meaning which should exclude all vagaries which render courts the tyrants of the constitution, this clause [law of the land] . . . can claim to have [it] both from its history and long received interpretation."

It is urged that it limits the legislature in regulating the vendability of property.

"Pushed to its necessary conclusions the argument goes to the extent, that once make out that anything real or personal is property, as everything in a general sense is, and legislation as to its use and vendability . . . must stop at the precise point at which it stood when the thing first came within the protection of this clause of the constitution."

A better reasoned or more conclusive refutation of the derived doctrine of due process of law, both from the standpoint of logic and history, could not well be asked for.

Thus the Wynehamer decision found no place in the constitutional

[101] 5 R. I. 185 (1858).

[102] *Ibid.* 497. See also 3 R. I. 64 (1854); also *ibid.* 289.

law that was generally recognized throughout the United States in the year 1856. Neither had it been foreshadowed by decisions in similar cases in other States, nor was it subsequently accepted in such cases. Also it met locally an immense amount of hostile criticism, both lay and professional. Altogether it must be considered an adversity, for the time being, to the derived doctrine of due process of law. All that was needed apparently to dispose of that doctrine at once and for all time was another such Pyrrhic victory: nor was such event long impending.

Just as the Court of Appeals of New York had persuaded itself that it must intervene to save the proprietors of spirituous liquors from the too harsh hand of legislative wrath, so also the Supreme Court of the United States had convinced itself that "the peace and harmony of the country" was to be preserved only by its "settling by judicial decision" the question of slavery in the territories adversely to the power of the National Legislature. It came about, therefore, that exactly a twelvemonth after the Wynehamer decision, Taney, C. J., read his famous opinion in Scott *v.* Sanford,[103] pronouncing the Missouri Compromise to have been void under the Due Process of Law clause of the Fifth Amendment of the United States Constitution. His language is as follows:

"An act of Congress which deprives a citizen of the United States of his liberty or property merely because he came himself or brought his property into a particular territory of the United States and who had committed no offense against the laws could hardly be dignified with the name of due process of law."

The extraordinary character of this pronouncement is shown by two circumstances: first, the fact that counsel at the bar did not allude in the remotest way to any such restriction upon Congressional power; and secondly, by the fact that at this point the Chief Justice carries with him only two of his associates, Grier and Wayne, both of whom present but short opinions accepting perfunctorily the Chief Justice's line of argument. Daniel, Campbell, and Catron, JJ., also held the Missouri Compromise to have been unconstitutional but upon far different grounds, Catron availing himself of the doctrine of the equality of the states, and Campbell and

[103] 19 How. (U. S.) 393 (1857).

Daniel — and particularly the former — of Calhoun's doctrine of state sovereignty and the correlative doctrine that Congress is but the agent of the states in the exercise of its delegated powers. Furthermore, at no other point is Justice Curtis' dissent more convincing than in his refutation of this use of the term "due process of law." Already two years earlier Curtis, J., speaking for the court in Murray *v.* Hoboken Land and Improvement Co.,[104] had ruled that legal process is not necessarily due process, and that the due process required by the Fifth Amendment means the processes of the common and statute law as these stood at the time of the adoption of the Constitution, that Congress in providing procedure for the enforcement of its acts must provide the procedure that is due. But no question of procedure was at issue in connection with the Missouri Compromise. How then could the Fifth Amendment be invoked? If the Missouri Compromise did indeed comprise one of a class of legislative enactments proscribed by the Fifth Amendment, what then, inquired Curtis, J., was to be said of the Ordinance of 1787, which Virginia and other states had ratified notwithstanding the presence of similar clauses within their constitutions? What again was to be said upon that hypothesis of the act of Virginia herself passed in 1778, which prohibited the further importation of slaves? What was to be said of numerous litigations in which this and analogous laws had been upheld and enforced by the courts of Maryland and Virginia against their own citizens who had purchased slaves abroad, and that without anyone's thinking to question the validity of such laws upon the ground that they were not law of the land or due process of law? [105] What was to be said of

[104] 18 How. (U. S.) 272 (1855). See also Justice Curtis' opinion in Greene *v.* Briggs, 1 Curt. (U. S.) 311. See also Johnson, J., in Bank of Columbia *v.* Okely, 4 Wheat. (U. S.) 235 (1819): The words "law of the land" (of the Maryland constitution) "were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." The purport of this vague *dictum* has been much abused by late writers and judges: see, for example, Cooley, Const. Lim. 355, where it is praised as a "terse" and "accurate" statement. Bank of Columbia *v.* Okely involved only questions of procedure, and procedure is all that Johnson, J., had in mind, as is shown by his remark shortly afterward: "the forms of administering justice and the duties and powers of courts . . . must ever be subject to legislative will." 4 Wheat. (U. S.) 245.

[105] Citing 5 Call (Va.) 425; 1 Leigh (Va.) 172; and 5 Harr. & J. (Md.) 107. See Murray *v.* McCarty, 2 Munf. (Va.) 393 (1811), applying and enforcing the act of 1792, similar in purport to that of 1778.

the Act of Congress of 1808 prohibiting the slave trade, and the assumption of the Constitution that Congress would have that power without its being specifically bestowed, but simply as an item of its power to regulate commerce? What, again, was to be said of the Embargo Act, if the scope of Congressional authority to legislate within the limits of powers granted it was restricted by the Fifth Amendment; and what, finally, was to be said of a recent decision of the Supreme Court itself upholding in principle at least the claim of power represented by the Embargo Act?[106] Such were some of the questions which Curtis, J., put, to which obviously the Chief Justice's easy assumption of the point to be proved afforded no answer at all.

VII.

With Chief Justice Taney's decision in the Dred Scott case the story of Due Process of Law anterior to the Fourteenth Amendment comes practically to a close. Proceeding to gather up our results, we discover at once that the most conspicuous fact about our constitutional law as it stood on the eve of the Civil War was the practical approximation of the police power of the states to the sovereignty of the state legislatures within their respective constitutions, the purpose of which constitutions was universally held to be not to grant power, but to organize and limit powers which were otherwise plenary.[107] But while this was the general rule, due in part to the temporary eclipse of the judiciary and in part to the dominance of the notion of States Rights, yet there survived a number of restrictive principles, now in a state of suspended animation, so to speak, but easily susceptible of resuscitation. And one of these was the doctrine of "due process of law," whose title to continued vitality may be put upon the following grounds: First, the availability imparted to the Due Process of Law clause by the decision in Murray *v.* Hoboken Land and Improvement Co., as a constitutional buffer in connection with summary and administrative proceedings, a function hitherto subserved almost entirely

[106] United States *v.* Marigold, 9 How. (U. S.) 560.

[107] See particularly Redfield, C. J., in Thorpe *v.* Rutland, etc. R. R. Co., 27 Vt. 140 (1854).

by the Trial by Jury clause;[108] secondly, the steady extension, even among courts the most attached to the doctrine of legislative sovereignty, of the notion of "law of the land" and "due process of law" as equivalent to "general law" and as therefore inhibiting "special legislation";[109] thirdly, the equivalence established in Taylor *v.* Porter between "due process of law" and "due compensation" in questions of eminent domain; fourthly, the growing practice, for example, on the part of critics of the Dred Scott decision, to shift construction from the phrase "due process of law," to the terms "liberty" and "property" of the constitutional clause;[110] fifthly, the tendency of these terms, as shown in Ormond, J.'s opinion in the Dorsey case and in Hubbard, J.'s opinion in the Wynehamer case, to take on a progressively broader signification;[111] sixthly, the fact that the Massachusetts Supreme Court, owing to the formula by which power is vested by the Massachusetts constitution in the legislature to pass "all manner of wholesome and reasonable" laws, had never ceased to describe the police power, even when according it the broadest possible field of operation, as a power of "reasonable" legislation;[112] seventhly, the fact that the courts of New York had never surrendered the notion of legislative power as inherently limited;[113] eighthly, the fact that no court had *eo nomine* cast overboard the doctrine of vested rights;[114] ninthly, the fact that all courts generally described the police power, though without any apparent intention as yet of making such description a judicially enforceable limitation,

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[108] See the excellent old United States Digest, by Metcalf and Perkins (Boston, 1847), I, 562–564, Tit. "Constitutional Law," cap. "Right of Trial by Jury."

[109] See particularly Coulter, J., in Ervine's Appeal, 16 Pa. St. 263 (1851); and Christiancy, J., in Sears *v.* Cottrell, 5 Mich. 251 (1858).

[110] See the Republican Platform of 1860, paragraph 8.

[111] See a remark of the court in Board of Excise *v.* Barrie, 34 N. Y. 657 (1866), on "inconsiderate *dicta*" in the Wynehamer decision.

[112] See Massachusetts Constitution, Pt. II, Ch. I, Art. IV; Shaw, C. J., in Commonwealth *v.* Alger, 7 Cush. (Mass.) 53 (1851); State *v.* Gurney, 37 Me. 156 (1853). In this connection an utterance of the Massachusetts court with reference to police regulation of property rights has oftentimes been cited from the decision in Austin *v.* Murray, but without the least warrant, since the regulation referred to was by municipal by-law. The constitutional provision comes from the colonial charter of 1691.

[113] See particularly Sill *v.* Corning, 15 N. Y. 297 (1857), and People *v.* Draper, *ibid.* 532.

[114] See, for example, Miller, J., in Bartemeyer *v.* Iowa, 18 Wall. (U. S.) 129 (1874).

in terms of its historical applications;[115] tenthly, and lastly, the fact that similarly the police power was often grounded upon the common-law maxim *sic utere tuo ut alienum non laedas*,[116] a definition which like the historical definition bore with it the possible implication that the police power was a peculiar kind of power, exercisable constitutionally only for peculiar ends.

But now in this enumeration we have included many, if not all, of the essential elements of the modern flexible doctrine of due process of law. True, the proper admixture of these elements had not as yet in 1860 been suggested, but that it would be in the course of time, with the legislatures pressing upon the courts from one side and private interests from the other, who could doubt?

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[115] See Lincoln *v.* Smith, Goddard *v.* Jacksonville, *supra.*

[116] Thorpe *v.* Rutland, etc. R. R. Co., Commonwealth *v.* Alger, *supra*, following 2 Kent, Comm. 340.

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THE THEORY OF THE PLEADING. — Under the common-law system of pleading it is impossible to begin proceedings under one form of action, and then recover on proof of facts sufficient to maintain another form.[1] The manifest injustice resulting is only in part relieved by the device of amendment, since this is limited by the general rule that amendments cannot introduce a new cause of action.[2] Under that system the plaintiff stated, not the facts of the transaction from which the rights and duties of the parties arose, but what he conceived the legal effect of those facts to be; and if a mistake occurred in his conclusions, then unless permitted to amend he was thrown out of court and compelled to begin anew.[3]

To this was due in part the widespread adoption of codes; but the hostility and illiberality of the judiciary in construing and applying their provisions have led in many jurisdictions to a state of confusion and technicality unknown even at common law.[4] Under the codes the forms of action are abolished and the pleader is required to make only a "plain and concise statement of facts constituting each cause of action."[5] It is well settled that this in no way affects the fundamental rights and liabilities created by the law and the principles by which they are determined, nor alters the remedies afforded litigants.[6] But in contravention of the avowed purpose of the legislature some courts

[1] Savignac *v.* Roome, 6 T. R. 125, 129.
[2] Steffy *v.* Carpenter, 37 Pa. St. 41.
[3] For a glaring example of this, see Allen *v.* Tuscarora Valley R. Co., 78 Atl. 34 (Pa.).
[4] See 22 Green Bag, 438, 440.
[5] N. Y. CODE CIV. PROC., §§ 481, 3339.
[6] See POMEROY, CODE REMEDIES, 3 ed., §§ 67–81.

have evolved a doctrine of the "theory of the pleading" best stated as follows: "It is an established rule of pleading that a complaint must proceed upon some definite theory; and on that theory the plaintiff must succeed or not succeed at all. A complaint cannot be made elastic so as to take form with the varying views of counsel." [7] The application of this rule prevents not only a change from a legal to an equitable theory or *vice versâ*, but also, in some jurisdictions, a change of theory at law or in equity.[8] This doctrine is firmly established in Indiana [9] and Missouri,[10] but in many other jurisdictions the decisions are hopelessly confused.[11]

Logically, if the plaintiff has set forth facts in his complaint constituting a cause of action and entitling him to some relief legal or equitable, his action should not be dismissed because he has misconceived the nature of his remedial right.[12] And the decisions are tending strongly to that view, Wisconsin, especially, having abandoned its former position.[13] In a recent case the court permitted amendment of a complaint setting forth a cause of action for negligence so as to allow recovery under a statute. *Birt* v. *Southern R. Co.*, 69 S. E. 233 (S. C.). The argument advanced by advocates of the doctrine is based on the danger of surprise to the defense, but clearly no undue burden is imposed upon a party by compelling him to come into court prepared to defend on any possible legal view of the facts. On the other hand, it is the height of technicality to compel one, admittedly entitled to some relief, to begin his proceedings anew because of the failure of his counsel to select the proper theory.[14] The chief purpose of the pleadings is to notify the parties of the claims or defenses which will be advanced by their opponents, and that result being accomplished by a complete statement of the facts, they should not afford a means of escape from just liability.[15] The practicability of the rule contended for is shown by its success in the jurisdictions adopting it, and also by the satisfaction with the practice in some states whereby claims against decedents' estates are litigated with no other pleadings than an informal statement of claim in which no attempt is made to set forth a cause of action.

GIFTS INTER VIVOS OF CHOSES IN ACTION REPRESENTED BY A SPECIALTY. — Although in Coke's time a donee of a chose in action ac-

[7] Mescall *v.* Tully, 91 Ind. 96, 99.

[8] The theory of a case does not involve the amount of relief. Hence there is no departure from the theory when one obtains less relief than was asked for. Yorn *v.* Bracken, 153 Ind. 492; nor is it necessarily a departure when the relief to which one is entitled differs slightly from that asked, Matthias *v.* Warrington, 89 Va. 533.

[9] Oölitic Stone Co. *v.* Ridge, 83 N. E. 246, 247 (Ind.).

[10] Huston *v.* Tyler, 140 Mo. 252.

[11] See 8 Col. L. Rev. 523, 532, 533 and cases cited.

[12] White *v.* Lyons, 42 Cal. 279, 282. See Manning *v.* School District, 124 Wis. 84, 91.

[13] Manning *v.* School District, *supra;* Bieri *v.* Fonger, 139 Wis. 150; Bannen *v.* Kindling, 142 Wis. 613, overruling Supervisors *v.* Decker, 30 Wis. 624; Grimes *v.* Greenblatt, 47 Colo. 495; Cockrell *v.* Henderson, 81 Kan. 335; Crowder *v.* Fordyce Lumber Co., 93 Ark. 392; Bates *v.* Capital State Bank, 18 Idaho, 429. *Contra*, Jones *v.* Winsor, 22 S. D. 480.

[14] See Bieri *v.* Fonger, *supra.*

[15] See 4 Ill. L. Rev., 491, 494.

no right against the obligor,[1] it is now well settled that a gift of an obligation can be made. The law as to the methods of making a gift of a chose in action evidenced by a specialty is, however, in a confused condition. Most welcome, therefore, is the opinion of Parkhurst, J., in the recent case of *Talbot* v. *Talbot*, 78 Atl. 535 (R. I.), which explains the theory of some of the mooted transactions more adequately than has been done by any court heretofore.

The first requisite of a valid gift of a contract right is, of course, the intention of the owner to make a present gift.[2] Although by the anomalous doctrine of *Ex parte Pye*[3] a valid trust of a chose in action may be created by the owner's merely declaring himself trustee, this transaction requires an intention to create a trust, and the courts have firmly refused to find such an intention merely because an intended gift did not take effect.[4] The second requisite of a gift is some act regarded by the law as a valid execution of the intent. What acts are sufficient?

When a chose in action is represented by a written instrument, the obligee is possessed of two things, — the piece of paper and the right to sue the obligor. Some kinds of instruments, such as negotiable bills or notes, life insurance policies and certificates of stock, are by mercantile custom or express provision in the instrument itself transferable by indorsement and delivery. But as all such instruments are chattels, the usual methods of transferring other personal property[5] should also be sufficient to pass the paper; and as these instruments are muniments of title,[6] the right to the obligation should go with the instrument itself. If the instrument itself, or a deed of it, is delivered, together with an express power to collect, the donee acquires an interest which ought to make the power irrevocable. Even if no express power is given, one should be implied; for the donor would not have parted with his muniment of title had he intended to reserve to himself the right to collect, and, furthermore, he cannot force the donee to return the instrument.[7] Moreover, even if the transfer is one which is required to be made on the books of the obligor, as is often the rule as to stock and to savings-

[1] See 1 HARV. L. REV. 6, n. 2.

[2] Talbot *v.* Talbot, *supra;* Coolidge *v.* Knight, 194 Mass. 546.

[3] 18 Ves. 140. *Accord*, *Re* Shield, 53 L. T. R. N. S. 5, 8; Matter of Totten, 179 N. Y. 112.

[4] *Re* Shield, *supra;* Paine *v.* Paine, 28 R. I. 307; Norway Savings Bank *v.* Merriam, 88 Me. 146.

[5] A gift of a chattel can be made by delivery of the chattel, or a deed of it, but not by parol or a writing not under seal. See Cochrane *v.* Moore, 25 Q. B. D. 57.

[6] For a list of instruments which are, and which are not, muniments of title, see ROOD, WILLS, §§ 28, 29.

[7] The opinion in Talbot *v.* Talbot, *supra* (certificates of stock), covers all of these points, either by actual decision or *dicta*. But authority against almost every one of them can be found in the books. For a summary of the authorities, see AMES, CASES ON TRUSTS, 2 ed., 136–163, and notes, See also 5 HARV. L. REV. 35; 9 *id.* 488; 12 *id.* 498 (cited with approval in Talbot *v.* Talbot, *supra*, 547); 22 *id.* 453. That the diversity still exists is shown by an examination of the recent cases. See, for example, Allen-West Commission Co. *v.* Grumbles, 129 Fed. 287 (deed of stock certificate ineffective); Malone's Committee *v.* Lebus, 116 Ky. 975 (deed of note effective); Wilson *v.* Featherston, 122 N. C. 747 (delivery of savings-bank book ineffective); Polley *v.* Hicks, 58 Oh. St. 218 (delivery of savings-bank book effective). It has even been held that a writing without a seal purporting to pass a bond is an effective gift *inter vivos*. McGavic *v.* Cossum, 72 N. Y. App. Div. 35. But there seems to be no proper ground for such a decision.

bank accounts, the same result should be reached. Otherwise, in the words of Dean Ames, "We should have this extraordinary condition of things: the donee unable to transfer the shares or collect the deposit, because the gift is not deemed complete; the donor equally helpless, because he cannot produce the certificate or bank-book; the company or bank, on the other hand, in a position capriciously to recognize either the donor or donee as *dominus* of the claim, or, indeed, unless they come to some compromise, to refuse with safety to recognize either." [8] It is generally said that such an unregistered transfer of stock passes only an equitable title; [9] and some cases have held that an attaching creditor of the transferor should prevail against the transferee.[10] But, with submission, both of these views are wrong; and, while the corporation is justified in refusing to recognize the donee as stockholder until he asks for registration, he has nevertheless acquired a legal right to the stock.[11]

APPOINTMENT OF EXPERT WITNESSES BY THE COURT. — With increasing specialization in industry and science and the consequently increasing importance of expert opinion evidence, there has grown up much dissatisfaction with the old method, whereby each side calls its own expert witnesses, who are apt, consciously or unconsciously, to become partisans of the side employing them. About the mildest possible reform that promises any substantial improvement in those conditions was embodied in a Michigan statute recently held unconstitutional. *People* v. *Dickerson*, 129 N. W. 198 (Mich.). That statute provided for appointment by the court of not more than three suitable disinterested persons to investigate issues involving expert knowledge or opinion in homicide cases, and testify at the trial. It did not preclude either prosecution or defense from using other expert witnesses.

Due process of law,[1] which the court thought infringed, does not require a cast-iron adherence to the old forms of procedure.[2] It does not require that the judge refrain from expressing to the jury an opinion as to the credibility of particular witnesses although that is the practice in most states.[3] Federal courts and some state courts still follow the old common-law practice of charging on the facts as well as the law.[4] Neither does due process preclude the prosecution from calling witnesses whose names are not indorsed on the indictment or contained in the list given to the defendant.[5] However, it would be well for the legislature to provide for

[8] See AMES, CASES ON TRUSTS, 2 ed., 156, n. (cited with approval, Talbot *v.* Talbot, *supra*, 547).

[9] See Talbot *v.* Talbot, *supra*, 546; Basket *v.* Hassell, 107 U. S. 602, 614; 4 THOMPSON, CORPORATIONS, 2 ed., § 4318.

[10] Application of Murphy, 51 Wis. 519. *Contra*, Reilly *v.* Absecon Land Co., 75 N. J. Eq. 71.

[11] See Parker *v.* Bethel Hotel Co., 96 Tenn. 252, 284; 1 MORAWETZ, PRIVATE CORPORATIONS, 2 ed., §§ 193–200; 16 HARV. L. REV. 312.

[1] MICH. CONST., Art. II, Sec. 16; U. S. CONST., Amendment XIV.

[2] Hurtado *v.* California, 110 U. S. 516; Brown *v.* New Jersey, 175 U. S. 172.

[3] Dakota *v.* O'Hare, 1 N. D. 30; People *v.* O'Brien, 96 Cal. 171.

[4] Simmons *v.* U. S., 142 U. S. 148; McClain *v.* Commonwealth, 110 Pa. St. 263.

[5] People *v.* Machen, 101 Mich. 400; State *v.* Hollingsworth, 100 N. C. 535.

giving the accused the names of the official experts before the trial begins. The most that can be said against the statute is that possibly no opinion on some topics concerning which little is really known should be given the weight which the jury might attach to any opinion coming from men designated by the judge as suitable and disinterested experts. Such arguments should be addressed to the legislature. No doctrine of constitutional law is more frequently repeated than that the courts will not overthrow an act of the legislature simply because they deem it unwise.

Another ground on which the court bases its decision is that the statute in question transfers the power of choosing witnesses from the prosecuting attorney, an administrative officer, to a member of the judicial department, in violation of the provision of the state constitution for a separation of powers.[6] Comparing a theoretical analysis of the powers of government with the distribution of those powers by the state constitutions, it is apparent that legislative power (*e. g.* the veto) is entrusted to the governor. So the constitutions give the impeaching power, theoretically judicial, to the legislature. Furthermore, without express warrant in the usual state constitution, the judicial power of punishing contempt is exercised by the legislature,[7] while the courts exercise the legislative power of prescribing rules of practice and many theoretically administrative functions, such as appointing receivers to wind up the affairs of insolvent corporations, and administering estates of deceased persons. These are but a few of many illustrations which show that the distribution of powers is historical rather than analytical.[8] It is impossible definitely to assign every function of government to one of the three departments as a matter of logic, and it would be highly undesirable to do so as a matter of law.[9] There is a broad borderland of functions, which may be shifted from one department to another as circumstances require. Thus many powers formerly thought judicial [10] are now exercised by administrative officers or boards.[11] The power given by the Michigan statute to choose official experts resembles more closely the power to appoint referees than that to choose witnesses for one side. Hence, even if not analytically a judicial function, it is historically so.

RELIGIOUS BELIEF AS AFFECTING THE CREDIBILITY OF DYING DECLARATIONS. — One exception to the rule excluding hearsay evidence is the admission in a criminal prosecution for homicide of the dying declarations of the decedent as to the manner of his death. The essential requisite of such declarations is that they shall have been made when the declarant has lost all hope of life and is firmly convinced that he is

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[6] MICH. CONST., Art. IV.

[7] People *ex rel.* McDonald *v.* Keeler, 99 N. Y. 463; *In re* Gunn, 50 Kan. 155.

[8] See SALMOND, JURISPRUDENCE, 93–96.

[9] See GOODNOW, ADMINISTRATIVE LAW OF THE UNITED STATES, 24–42.

[10] Stone *v.* Elkins, 24 Cal. 125 (election contest). See State *ex rel.* Arpen *v.* Brown, 19 Fla. 563 (revoking license for cause).

[11] See Andrews *v.* Judge of Probate, 74 Mich. 278 (election contest); Hartford Fire Insurance Co. *v.* Raymond, 70 Mich. 485 (revoking license for cause).

about to die.[1] He may then be regarded as induced by the most powerful considerations to speak the truth. In the words of Eyre, C. B., "A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice." [2] But the solemnity of the circumstances is no more an absolute guaranty of truthfulness than is an oath; and so if the decedent would not have been a competent witness in a court of justice his dying declarations are not admissible there.[3] Thus, as a lack of religious belief would originally disqualify any one as a witness, because of the religious nature of an oath, so the dying declarations of any one who did not believe in future rewards and punishments were inadmissible.[4] This theological qualification of testimonial capacity, however, has been removed, and a non-believer is no longer necessarily an incompetent witness.[5] Arguing from this premise a man's dying statements are probably no longer excluded on merely religious grounds.[6] The problem then arises, whether a decedent's peculiar religion or his lack of any religion may be shown to impeach his dying declarations. In jurisdictions that allow such impeachment of a living witness the answer must be affirmative.[7] It is submitted that the converse need not be true, and that a recent case was wrong in deciding that as want of religion could not be shown to impeach a living witness it was inadmissible to shake the credibility of dying declarations. *State* v. *Yee Gueng*, 112 Pac. 424 (Ore.). But though it is fair to argue that what will shake the stronger testimony will shake the weaker also, *non sequitur* that what will not shake the stronger will not shake the weaker. Three effective safeguards surround testimony that is given on the witness stand: the jury can observe the witness' demeanor; he is subject to cross-examination; and a more than possible result of a lie is a criminal prosecution for perjury. A dying declaration is subject to none of these tests. It is a hazardous form of evidence at best; it therefore should be received with caution, and its weight should be carefully calculated.[8] The thought of immediate death may strongly impel the ordinary Anglo-Saxon to speak the truth, but it certainly will not affect all minds alike. It is entirely logical for one to say, "I am about to die, therefore why tell the truth?" Indeed Stephen's History of the Criminal Law tells us that in the Punjab a native, mortally wounded, frequently makes a statement implicating all his hereditary enemies in his murder.[9] And whether a dying man is impelled towards truth or falsehood depends in large measure upon how he regards impending death. Surely the

[1] Queen *v.* Jenkins, 1 C. C. R. 187; Peak *v.* State, 50 N. J. L. 179; Tracy *v.* People, 97 Ill. 101.

[2] Rex *v.* Woodcock, Leach Cr. Cas. 397.

[3] See GREENLEAF, EVIDENCE, 16 ed., § 157.

[4] Rex *v.* Pike, 3 C. & P. 598; Donnelly *v.* State, 26 N. J. L. 463.

[5] See GREENLEAF, EVIDENCE, 16 ed., § 370.

[6] People *v.* Sanford, 43 Cal. 29; State *v.* Elliot, 45 Ia. 486; State *v.* Ah Lee, 8 Ore. 214. This conclusion however is not a necessary one. See WIGMORE, EVIDENCE, § 1443.

[7] People *v.* Sanford, *supra;* State *v.* Elliot, *supra.* See also analogous cases: State *v.* Baldwin, 15 Wash. 15; Lester *v.* State, 37 Fla. 382; Com. *v.* Cooper, 5 All. (Mass.) 495.

[8] People *v.* Kraft, 148 N. Y. 631; Queen *v.* Jenkins, *supra*, 193; Starkey *v.* People, 17 Ill. 17, 22.

[9] See 1 STEPHEN, HIST. CRIM. LAW, 448.

dying declarations of a man impressed with a firm belief of future accountability are entitled to greater credence than those of a man with no sense of religious responsibility.[10]

PERSONAL JURISDICTION OVER RESIDENTS BY SUBSTITUTED SERVICE. — The situations in which jurisdictional difficulties are presented may generally be classified as follows: (1) A court in state A attempts directly to affect the title to property in state B; (2) a court in state A attempts to affect the title to property in state B when a person with an existing right in the title is in state A; (3) a court in state A attempts directly to affect the rights of a person in state B; (4) a court in state A attempts to affect the rights of a person in state B who owns property in state A.

In (1) the court clearly has no jurisdiction.[1] In (2), however, it can incidentally affect the title by compelling action on the part of a person over whom it has jurisdiction.[2] (4) is analogous to (2), since the court, by acting on the title to property over which it has jurisdiction, can incidentally affect the rights of a non-resident.[3] Proceedings under this class may be either strictly *in rem*,[4] or *quasi in rem*.[5] (3) corresponds to (1), but is not so easily disposed of. The general rule is that personal jurisdiction without consent can be acquired only by personal service within the state. It is almost universally applied to non-resident foreigners.[6] The assumption by the English courts of jurisdiction over foreigners on substituted service when authorized by statute, is due to the supremacy of Parliament, and is in little danger of imitation in this country.[7] Even in England the jurisdiction of a foreign court in such a case is denied.[8] Acquiring jurisdiction over foreign corporations by serving their agents within the state is not an exception to the general rule, since it is based on consent,[9] which is a recognized basis for personal jurisdiction.[10] The principle that personal jurisdiction, once acquired, continues through all proceedings which form part of the same litigation is also no exception.[11]

There is, however, a dispute whether there is not a real exception in the case of residents of the state. In many decisions on the question of personal jurisdiction over non-residents, the language is broad enough

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[10] Nesbitt *v.* State, 43 Ga. 238; Goodall *v.* State, 1 Ore. 333; Carver *v.* United States, 164 U. S. 694, 697.

[1] See WHARTON, CONFLICT OF LAWS, §§ 273, 274, 278.

[2] Massie *v.* Watts, 6 Cranch (U. S.) 148. See 20 HARV. L. REV. 382.

[3] Arndt *v.* Griggs, 134 U. S. 316.

[4] Huling *v.* Kaw Valley Railway & Improvement Co., 130 U. S. 559.

[5] Hogle *v.* Mott, 62 Vt. 255. See Pennoyer *v.* Neff, 95 U. S. 714. In all proceedings *in rem* reasonable notice is necessary to satisfy constitutional requirements. Roller *v.* Holly, 176 U. S. 398.

[6] Pennoyer *v.* Neff, *supra;* Eliot *v.* McCormick, 144 Mass. 10; Buchanan *v.* Rucker, 9 East 192.

[7] See 24 HARV. L. REV. 318.

[8] Schibsby *v.* Westenholz, 6 Q. B. 155; Buchanan *v.* Rucker, *supra.*

[9] St. Clair *v.* Cox, 106 U. S. 350; Gibbs *v.* Queen Insurance Co., 63 N. Y. 114.

[10] Jones *v.* Merrill, 113 Mich. 433; Copin *v.* Adamson, 9 Ex. 345. See Rousillon *v.* Rousillon, 14 Ch. D. 351, 371.

[11] Burns *v.* Belknap, 22 Vt. 419; Fitzsimmons *v.* Johnson, 90 Tenn. 416.

to include residents who are outside the state,[12] and a few squarely decide that jurisdiction can be acquired over residents in no other way than over non-residents.[13] In accord with this view is a recent decision declaring unconstitutional a statute which gave personal jurisdiction over residents of the state who were personally served outside its territory. *Raher* v. *Raher*, 129 N. W. 494 (Ia.). These cases illustrate the modern tendency of the law to emphasize the importance of the territorial at the expense of the personal relation between the individual and the state, though many personal duties to the state are still recognized.[14] This tendency is doubtless sound; but it is submitted that the personal relation is still potent enough to enable the state to stipulate by what method its citizens or residents,[15] even when temporarily outside the territory, should become amenable to the orders of its courts, and that constitutional requirements are satisfied by providing for some reasonable form of notice. This view seems to be supported by the weight of authority, it being generally held that any reasonable form of substituted service gives personal jurisdiction over domestic corporations[16] and residents[17] of the state, whether they are within its territory or outside.

CONTRIBUTION BETWEEN CO-SURETIES ON PARTIALLY CONCURRENT OBLIGATIONS. — Stated broadly, the equitable[1] doctrine of contribution is, that when one person has discharged an obligation, which another had likewise assumed, he is entitled to be reimbursed proportionably to the risk assumed by each.[2] The application of this rule where the obligations are coextensive presents a simple problem in arithmetic.[3] But where the two instruments are only partially concurrent a more difficult question is presented, involving a determination of what portion of the broader obligation is applicable to the common risk.

The cases dealing with this problem may be divided into two classes: first, where the only element of loss is one for which both sureties are

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[12] See Pennoyer *v.* Neff, *supra*.

[13] Moss *v.* Fitch, 212 Mo. 484; De la Montanya *v.* De la Montanya, 112 Cal. 101; Smith *v.* Grady, 68 Wis. 215.

[14] See SALMOND, JURISPRUDENCE, 195.

[15] In this respect no distinction is drawn between citizens and domiciled residents. See Huntley *v.* Baker, 33 Hun (N. Y.) 578.

[16] Clearwater Mercantile Co. *v.* Roberts, etc. Shoe Co., 51 Fla. 176; Continental Nat. Bank *v.* Thurber, 74 Hun (N. Y.) 632.

[17] Harryman *v.* Roberts, 52 Md. 64, 76; Henderson *v.* Staniford, 105 Mass. 504; Huntley *v.* Baker, *supra;* Ouseley *v.* Lehigh Valley Trust & Safe-Deposit Co., 84 Fed. 602; Douglas *v.* Forrest, 4 Bing. 686; Becquet *v.* MacCarthy, 2 B. & Ad. 951, 958. As to what is not reasonable notice, see Bardwell *v.* Collins, 44 Minn. 97. The position taken in the principal case that a distinction is to be drawn between actual service outside the state and service by leaving at the defendant's residence, in favor of the latter, seems untenable. See Anheuser-Busch Brewing Assn. *v.* Peterson, 41 Neb. 897.

[1] See AMES, CASES ON SURETYSHIP, 537, n. 1.

[2] Armitage *v.* Pulver, 37 N. Y. 494; Thurston *v.* Koch, 4 Dall. (U. S.) 348. See also Deering *v.* The Earl of Winchelsea, 2 B. & P. 270; Pendlebury *v.* Walker, 4 Y. & C. 424, 441.

[3] Citizens Ins. Co. *v.* Hoffman, 128 Ind. 370; Farmers' Feed Co. *v.* Scottish Union Ins. Co., 173 N. Y. 241.

liable, and second, where a portion of the loss is covered by both obligations and the remainder must be borne by one alone. The decisions in both classes are confined almost exclusively to the adjustment of loss between so-called "specific" and "blanket" fire policies,[4] containing a *pro ratâ* clause intended to effect without circuity of action the result produced by contribution.[5] An examination of the second class of cases discloses a hopeless confusion,[6] in which can be discovered no definite principle other than a desire to give the insured the fullest indemnity.[7] In the first class, it is held that the amount insured by the blanket policy is the greatest sum for which it would be liable, in the event of a total loss of the property covered by the specific policy.[8] This method of apportionment seems theoretically correct, in view of the principle that it is the hazard assumed by each insurer that determines the ratio of contribution.

The applicability of this rule to fidelity insurance [9] is denied in the recent case of *American Surety Co.* v. *Wrightson*, 103 L. T. R. 663 (Eng., K. B. Div., Nov. 15, 1910). The plaintiff had guaranteed a bank against loss up to $2500 by the dishonesty of a certain employee. The defendant in a general policy of £40,000 insured, among other things,[10] against loss from the same source. The employee misappropriated $2680. In the suit for contribution, it was held that the proper ratio is as 2500 is to 2680. The decision is a departure from the equitable principle, in that the proportion is made to depend upon the loss rather than upon the initial undertaking. Surely the greater scope of the blanket policy furnishes no valid reason for applying a different rule. Every policy is a blanket policy in so far as it partially insures a certain subject matter, any portion of which may be separately insured by a smaller policy.

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[4] Cherry *v.* Wilson, 78 N. C. 164; Burnett *v.* Millsaps, 59 Miss. 333. In these cases, both of the second class, the question of apportionment between co-sureties on a sheriff's bond was presented. The court held in both cases that the common loss should be divided in half.

[5] See Cromie *v.* Kentucky & Louisville Mutual Ins. Co., 15 B. Mon. (Ky.) 432; Howard Ins. Co. of N. Y. *v.* Scribner, 5 Hill (N. Y.) 298, 301.

[6] It has been held that this is not a case of concurrent insurance and no question of apportionment is involved. Meigs *v.* Insurance Co. of North America, 205 Pa. St. 378. *Contra*, W.-H. Coffee Co. *v.* Merchants', etc. Ins. Co., 110 Iowa 423. Sometimes the policy is apportioned among the various items insured proportionably to their value. Chandler *v.* Ins. Co. of North America, 70 Vt. 562. The apportionment has also been based on the losses on the different parcels. Mayer *v.* American Ins. Co., 2 N. Y. Supp. 227. According to the so-called Cromie rule, the general policy pays first the loss on property not doubly insured. See Cromie *v.* Kentucky & Louisville Mutual Ins. Co., *supra*. With this last may be contrasted the "gradual reduction" rule, in which the first payment is made on the item suffering the greatest loss. Schmaelze *v.* London & Liverpool Fire Ins. Co., 75 Conn. 397. See RICHARDS, INSURANCE LAW, 440, n. 4; GRISWOLD, FIRE UNDERWRITERS' TEXT-BOOK, 661–685.

[7] Angebrodt & Barth *v.* Delaware Mutual Ins. Co., 31 Mo. 593; Ogden *v.* East River Ins. Co., 50 N. Y. 388, 391.

[8] If the value of the specific thing is greater than the blanket policy, the full amount pro-rates with the smaller policy. Page *et al. v.* Sun Ins. Co., 74 Fed. 203. Otherwise the value of the specific property determines. Erb *v.* Fidelity Ins. Co., 99 Iowa 727.

[9] There is some conflict as to whether fidelity insurance is properly suretyship or insurance. See RICHARDS, INSURANCE LAW, 655; VANCE, INSURANCE, §§ 247–248.

[10] The general policy covered loss of securities, negotiable paper or currency, on or off the premises, by robbery, theft, fire, embezzlement, burglary, or negligence or fraud of employees.

The presence of such lesser policy cannot alter the nature of the more extensive insurance.[11] The risk of the latter is comparatively greater, but that is an incident of the size of the obligation assumed, for which the insurer presumably exacts a greater reward.[12] Nor is the fact that the loss was first paid by a co-surety a reason for lightening the burden undertaken by the more general policy.

From a practical viewpoint, it is evident that the nature of this risk renders it peculiarly difficult to limit the amount at hazard on this one item, as may be done in fire insurance by showing the value of the specific thing. Conceivably this one employee might have stolen £40,000, for which the policy would have been liable.[13] In the absence of proof that his opportunities to misappropriate were restricted, the ratio would necessarily be 2500 to 193,600. An appearance of unfairness in that result seems to have been the controlling ground of the decision.

JURISDICTION OVER FOREIGN VESSELS. — Over foreign public vessels in its ports every nation is understood to waive the exercise of its territorial jurisdiction.[1] This concession, based on international courtesy and not a matter of right,[2] is made because it is not to be considered that a vessel, representing the dignity and sovereign power of an independent state, and its crew as public functionaries, would submit to another authority.[3] Though the extent of this concession is still in dispute, the difference is for the most part one of terminology rather than of substance. Most writers assert that such a vessel is to be treated as part of the territory of its sovereign, agreeing, however, that it must commit no act of aggression and must respect the local port regulations.[4] The latest writers oppose this doctrine of extraterritoriality as an inaccurate and confessedly misleading[5] fiction, but they admit that the vessel and crew are to be regarded as not subject to the territorial jurisdiction.[6] The latter view, sounder in theory, is probably the one actually applied by the nations.[7] On the other hand, in regard to foreign private ships in port there is a difference in practice rather than in theory. It seems

[11] See GRISWOLD, FIRE UNDERWRITERS' TEXT-BOOK, § 2079.
[12] See *id.*, § 1545.
[13] Cromie *v.* Kentucky & Louisville Mutual Ins. Co., *supra.*

[1] The Schooner Exchange *v.* M'Faddon, 7 Cranch (U. S.) 116.
[2] See The Santissima Trinidad, 7 Wheat. (U. S.) 283, 353. Since this exemption is based on toleration the sovereign of the port might revoke it and exclude or expel such vessels or, conceivably, attempt to submit them to its jurisdiction — with the necessity of answering to the sovereign of the vessel for such acts. See PRADIÈR-FODÉRÉ, DROIT INTERNATIONAL PUBLIC, § 2405; 2 MOORE, DIGEST OF INTERNATIONAL LAW, § 253.
[3] See 3 CALVO, LE DROIT INTERNATIONAL, 337. *Cf.* M'Culloch *v.* Maryland, 4 Wheat. (U. S.) 316; Dobbins *v.* Commissioners of Erie Co., 16 Pet. (U. S.) 435.
[4] See ORTOLAN, DIPLOMATIE DE LA MER, 212; LAW MAG. AND REV., No. 219, p. 201.
[5] See ORTOLAN, DIPLOMATIE DE LA MER, 212.
[6] See HALL, INTERNATIONAL LAW, 3 ed., 191; PRADIÈR-FODÉRÉ, DROIT INTERNATIONAL PUBLIC, §§ 2401, 2403; PIETRI, LA FICTION D'EXTERRITORIALITÉ, 364.
[7] See 2 Mich. L. Rev. 347. There is some authority, however, for saying that the local jurisdiction over criminals is not ousted by their escape to a foreign war-vessel. See REPORT OF ROYAL COMMISSION ON FUGITIVE SLAVES; 1 Op. Atty. Gen. 47.

universally admitted that over them the territorial sovereign retains complete jurisdiction.[8] The French rule of practice is for that sovereign to refuse to exercise it over acts relating solely to the internal discipline of such vessels and offenses committed by one member of the crew against another without disturbing the peace of the port.[9] This rule, though not universal, is growing in favor and is embodied in numerous treaties.[10] But acts of the territorial legislature intended to apply to such vessels must be followed.[11] So on any view a recent case in which the master of a Norwegian ship in Manila Bay was fined by a Philippine court because of conditions on board, seems right.[12] *United States* v. *Bull*, 5 Am. J. Int. Law, 242 (Phil. Is., Sup. Ct., Jan. 15, 1910).

The law concerning jurisdiction over foreign vessels in the littoral seas is still in the making. A public vessel will there undoubtedly have the exemptions it enjoys in port; but as to merchantmen the publicists are in conflict. By some it is said that the vessel is subject to the same jurisdiction as if in port.[13] By others it is urged that the vessel is to be regarded as in no way subject to the jurisdiction of the littoral state, though bound to abide by its navigation regulations.[14] And there is the intermediate position that, while as a general rule a vessel is subject to the jurisdiction of the littoral state, one merely passing through is subject only in respect of acts which violate the interests of that state or of its subjects outside the vessel.[15] These numerous distinctions between ports and littoral seas, between vessels at anchor and those passing through, between offenses taking effect on board and those taking effect outside, seem difficult to justify on principle as affecting jurisdiction. Despite the objection of certain theoretical writers every nation does claim the rights of a sovereign over its littoral seas.[16] And there has been no evidence of an intent to relinquish jurisdiction, but of quite the contrary.[17] So the jurisdiction of the littoral state should be admitted and to it should be left the determination of the rare cases of its exercise as a matter of expediency, a system that has worked well enough as to ports.

PURCHASE FOR VALUE AND WITHOUT NOTICE OF EQUITABLE INTERESTS. — It is the accepted doctrine in England that as between

[8] The rule of practice in France is sometimes there stated to be based on lack of jurisdiction over the acts. But that this is not true is shown by the fact that the French port authorities will exert jurisdiction when asked. See ORTOLAN, DIPLOMATIE DE LA MER, 223, 224.

[9] See 1 CALVO, LE DROIT INTERNATIONAL, 555.

[10] Wildenhus's Case, 120 U. S. 1. See HALL, INTERNATIONAL LAW, 3 ed., 200.

[11] Patterson *v.* Bark Eudora, 190 U. S. 169. See 15 HARV. L. REV. 411.

[12] An objection to lack of jurisdiction over the subject-matter of the offense on the ground that the failure to provide suitable appliances and the subsequent voyage were outside Philippine waters, was answered by saying that the offense was a continuing one and existed during the trip up Manila Bay.

[13] See HALL, INTERNATIONAL LAW, 3 ed., 202.

[14] See IMBART-LATOUR, LA MER TERRITORIALE, 307.

[15] RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW, 1894, Art. 6, 7, 8.

[16] The right of innocent passage of foreign vessels through such waters seems conceded. See OPPENHEIM, INTERNATIONAL LAW, 243; HALL, INTERNATIONAL LAW, 202.

[17] See the Act of Parliament, ST. 41 & 42 VICT. c. 73, following the decision in the case of the Franconia, The Queen *v.* Keyn, 2 EX. D. 63.

conflicting equities that which is prior in time should prevail. This rule is undoubtedly sound when the rights of both parties are against the same person. Thus if a trustee sells without conveying the legal title to a third party who pays value without notice, the *cestui* will be preferred; for since the rights of each are mutually exclusive so far as the possibility of equitable relief against the trustee is concerned, it is only fair that he who first secured his right should prevail.[1] But the English cases do not stop here. Thus if one who holds an equity of redemption in trust assigns it to a purchaser for value without notice, the latter will be postponed to the *cestui*.[2] Yet here the *cestui's* right, though earlier in date, would only be against the fraudulent assignor, whereas, by the assignment, the purchaser would secure a direct right against the legal owner. Hence these rights would not be mutually exclusive, because they would be against different persons, and there seems no affirmative reason why the purchaser, who alone would have a direct right against the owner of the *res*, should hold it subject to the *cestui's* right. Similarly, the general rule in England that the assignee of a chose in action takes subject to all prior equities against the assignor is an example of the same doctrine.[3]

In a recent English case, persons having a power of appointment among children over an equitable interest fraudulently executed this power in favor of one son who thereupon sold his interest to a purchaser for value without notice. *Cloute* v. *Storey*, [1911] 1 Ch. 18. Since a fraudulent appointment is not void but only voidable,[4] it follows that the appointee would take in constructive trust for the person entitled in default of appointment. The latter prevailed against the *bonâ fide* purchaser on the ground that his equitable right against the appointee was prior in time to the purchaser's equity against the trustee of the fund. Though in view of the English doctrine such a decision was to be expected,[5] it is to be observed that such a result is in conflict with the general principle that equity follows the law; for had the interest appointed been legal, the purchaser would have prevailed.[6] For it is fundamental that a *bonâ fide* purchaser of a legal interest takes free and clear of the equities of third persons.[7] Since the reason is that equity will not lend its aid to take from a person that which he has obtained for value and in good faith, it is hard to see why this salutary doctrine should not serve to protect other property rights besides legal interests. That it does do so would seem to be the true basis for the decisions in this country which hold, in opposition to the English view, that the

[1] Baillie *v.* M'Kewan, 35 Beav. 177.

[2] Cave *v.* Cave, 15 Ch. Div. 639.

[3] Moore *v.* Jervis, 2 Coll. 60; Cory *v.* Eyre, 1 De G., J. & S. 149. The protection afforded an assignee of a stock certificate, which is an apparent exception to this doctrine, is put on grounds of equitable estoppel. Dodds *v.* Hills, 2 Hem. & M. 424.

[4] In Green *v.* Pulsford, 2 Beav. 70, such an appointment of a legal interest was held only voidable. In Preston *v.* Preston, 21 L. T. Rep. N. S. 346, a fraudulent appointment of an equitable interest was held capable of confirmation by those entitled in default.

[5] This is the first decision in England on this point. Though the facts are similar in Daubeny *v.* Cockburn, 1 Meriv. 626, the decision there in favor of the person entitled in default was due to his having also the legal title to the trust fund.

[6] Green *v.* Pulsford, *supra*.

[7] Reynell *v.* Peacock, 2 Rolle 105; Molony *v.* Rourke, 100 Mass. 190.

assignee of a chose in action takes free and clear of the equities of third parties.[8] These cases have been explained on the ground that the assignee gets not only an equitable right to sue in his assignor's name, but also a legal right to collect, of which equity should not deprive him.[9] But the decisions do not turn on that theory, and it is submitted that when the interest assigned is purely equitable, as in the principal case, the same result should be reached.

WHETHER NEGLIGENT ACT OR DAMAGE CAUSED THEREBY CONSTITUTES CAUSE OF ACTION. — The larger body of authority goes to show that in an action for negligence the cause of action is the damage to the plaintiff caused by the defendant's negligence. Thus the Statute of Limitations runs only from the time when the damage occurred, not from the time of the negligent act.[1] A single act, by causing distinct damages to the plaintiff at different times, may give rise successively to more than one right of action.[2] And a leading case holds that a recovery for damage to property is not a bar to an action for personal injury caused simultaneously by the same negligent act.[3] On like reasoning the union of claims for damages to person and property, though caused by a single act, has been held a misjoinder of causes of action.[4]

On the other hand, two recent cases, examples of a considerable body of authority in this country, have been decided on the theory that the cause of action is not the violation of the plaintiff's right, but the defendant's "tortious act" or "wrong"; that there is, therefore, but one cause of action for the damage to both person and property. In one it was held that a judgment for the damage to property barred an action for the personal injury. *Ochs* v. *Public Service Ry. Co.*, 77 Atl. 533 (N. J., Sup. Ct.).[5] In the other the court overruled a motion to state separately the causes of action, both claims having been included in one count.

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[8] Kent, Ch., originated this theory by his *dicta* in Murray *v.* Lylburn, 2 Johns. Ch. (N. Y.) 441. Though repudiated in New York in Bush *v.* Lathrop, 22 N. Y. 535, his theory has generally prevailed in this country. Porter *v.* King, 1 Fed. 755. For a full collection of the authorities see 68 ALB. L. J. 290.

[9] See 1 HARV. L. REV. 1, 7, and 8.

[1] Roberts *v.* Read, 16 East 215. See Dyster *v.* Battye, 3 B. & Ald. 448. But the statute runs from the time when there is any damage which will support an action. Howell *v.* Young, 5 B. & C. 259; Moore *v.* Juvenal, 92 Pa. St. 484. *Cf.* Wood *v.* Carpenter, 101 U. S. 135.

[2] Backhouse *v.* Bonomi, 9 H. L. Cas. 503; Illinois Central R. Co. *v.* Wilbourn, 74 Miss. 284. *Cf.* Lee *v.* Kendall, 56 Hun (N. Y.) 610.

[3] Brunsden *v.* Humphrey, 14 Q. B. D. 141. *Accord*, Newbury *v.* Conn. & Pass. Rivers R. Co., 25 Vt. 377; Watson *v.* Texas & P. Ry. Co., 8 Tex. Civ. App. 144; Reilly *v.* Sicilian Asphalt Paving Co., 170 N. Y. 40. So also where one action is for injuries to the plaintiff, the other, his action for injuries to his wife. Skoglund *v.* Minneapolis Street Ry. Co., 45 Minn. 330; Texas & P. Ry. Co. *v.* Nelson, 9 Tex. Civ. App. 156. Or where one is case for damage to personalty, the other, case for damage to realty. Southside R. R. Co. *v.* Daniel, 20 Grat. (Va.) 344. Hagan *v.* Casey, 30 Wis. 553, goes too far in allowing two actions of trespass *quare clausum* where a single entry causes damage to realty and to personalty.

[4] Boerum *v.* Taylor, 19 Conn. 122; Townsend *v.* Coon, 7 N. Y. Civ. Proc. Rep. 56; Lamb *v.* Harbaugh, 105 Cal. 680.

[5] *Accord*, King *v.* Chicago, M. & St. P. Ry. Co., 80 Minn. 83.

Bilikan v. *Columbus Railway & Light Co.*, 20 Oh. Dec. 609 (Ohio, Franklin Common Pleas).[6]

On principle this latter theory is clearly wrong. The defendant "is answerable for the consequences of negligence, not the abstract existence of it." [7] So far from the defendant's negligent act being the cause of action, it is "tortious" and a "wrong" only when it injures the plaintiff's right by causing him damage. If one's property is damaged by a negligent act and he becomes bankrupt and later suffers personal injuries from the same act, is he to be told that the sole cause of action for the negligence has passed to his trustee? Or if no damage results till more than six years after the so-called "cause of action" occurred, is the suit outlawed by the Statute of Limitations? [8] Indeed, it is hard to see why this doctrine would not require several victims of a negligent act to sue jointly for all the damage done.

The practical result in each of the principal cases is not very objectionable. The Ohio case at most allows recovery for two causes of action on a complaint of one count.[9] While the New Jersey case decides matter of substance, its tendency is perhaps to prevent unnecessary vexation of the defendant where both causes of action may conveniently be sued on together.[10] But if this reason does not apply, as where recovery is sought in different capacities, and the question is therefore purely whether one negligent act can give rise to more than one cause of action, judgment in one action is rightly held not to bar the other.[11] Among the circumstances [12] under which holding the defendant's act to be the cause of action would produce substantial difficulties are those resulting from the doctrine of bankruptcy that rights of action for injury to prop-

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[6] *Accord*, Baltimore & Ohio R. Co. *v.* Ritchie, 31 Md. 191; Braithwaite *v.* Hall, 168 Mass. 38. *Cf.* Doran *v.* Cohen, 147 Mass. 342. In the other cases adopting this theory the real ground for decision was that the objection of duplicity was not taken, but only that of misjoinder: Birmingham Southern Ry. Co. *v.* Lintner, 141 Ala. 420; or that pleading over cured the defect of duplicity: Seger *v.* Barkhamsted, 22 Conn. 290; Lamb *v.* St. Louis, etc. Ry. Co., 33 Mo. App. 489. It is doubtless correct that injury to the person and clothing on the person gives but one right of action. See Bliss *v.* New York, etc. R. R., 160 Mass. 447, 455.

[7] Per Gibson, C. J., in Hart *v.* Allen, 2 Watts (Pa.) 114, 116.

[8] The affirmative answer was made a *ratio decidendi* in Schade *v.* Gehner, 133 Mo. 252, 259. The actual decision was correct, however, as the statutory period had run since the occurrence of damage.

[9] This has been allowed by courts recognizing that there are two causes of action. Shoemaker *v.* Atkin, 11 Heisk. (Tenn.) 294. See Chicago, etc. Ry. Co. *v.* Ingraham, 131 Ill. 659.

[10] See 15 HARV. L. REV. 752.

[11] *E. g.*, an action by an administrator for the benefit of the estate and one for the benefit of the next of kin, the negligence complained of being the same in each. Barnett *v.* Lucas, Ir. R. 6 C. L. 247; Leggott *v.* Great Northern Ry. Co., 1 Q. B. D. 599; St. Louis, etc. Ry. Co. *v.* Sweet, 63 Ark. 563. So where negligence causes damage to partnership property and personal injury to one partner. Taylor *v.* Manhattan Ry. Co., 53 Hun (N. Y.) 305. *Cf.* Taylor *v.* Metropolitan, etc. Ry. Co., 52 N. Y. Super. Ct. 299. Attempts have been made to explain these cases on the ground that one cause of action can be split where two suits are necessary to protect the rights injured. Peake *v.* Baltimore & Ohio R. Co., 26 Fed. 495. See Cincinnati, etc. R. R. Co. *v.* Chester, 57 Ind. 297.

[12] Other difficulties may arise because of different periods of limitation for the two classes of actions and the different rules as to assignability and equitable execution. See also note 8, *supra*.

erty pass to the trustee, while those for personal injury do not.[13] Failure to recognize that the kinds of damage form the test of the number of causes of action is frustrating this rule by allowing the bankrupt to sue for damage to property as well as the person, if caused by the same act.[14]

ESTOPPEL PREDICATED UPON INNOCENT MISREPRESENTATION. — Assuming the existence of the other elements [1] necessary to an estoppel by misrepresentation, the question whether the estoppel can arise when there has been only an innocent misrepresentation is one upon which the authorities are not unanimous. The statement that fraud is an essential ingredient of the misrepresentation is frequently made.[2] A determination as to the accuracy of the requirement is to be reached by recognizing and applying the fundamental principle upon which the whole doctrine of estoppel by conduct rests. That principle is simply this: that a man will be precluded from denying the truth of misrepresentations when to allow him to deny would be contrary to equity and good conscience.[3] The doctrine, then, being broadly founded upon fairness, the inquiry now becomes whether the denial of an honest misrepresentation may ever be so unconscionable as to be prohibited. The fact that the subject is equitable in its nature makes this peculiarly a matter to be determined by all the circumstances of a particular case. There are, however, three general situations which in a broad way illustrate the question.

Suppose, first, that A innocently but mistakenly points out as the boundary between his lot and B's a line inside his own land, up to which B in reasonable reliance builds. On discovering his error A is estopped as against B to claim to the true line.[4] "When one of two innocent persons must suffer, he shall suffer who by his own acts occasioned the confidence and loss." [5] To permit A now to repudiate his prior assertion would be to permit him to inflict upon B a palpable injustice and would be tantamount to sanctioning a fraud.[6] Secondly, the question may arise when A, with no fraudulent intent, has so made it possible for X to make a successful misrepresentation that A's action may fairly be considered an efficient cause of the ensuing change of B's position. And here the result will be identical: thus when A, on sending his cattle to be pastured with X's herd, puts X's brand on them, he is estopped later to

[13] See 24 HARV. L. REV. 396.

[14] Brewer *v.* Dew, 11 M. & W. 625; Rose *v.* Buckett, [1901] 2 K. B. 449. But see Darley Main Colliery Co. *v.* Mitchell, 11 App. Cas. 127, 144; 15 HARV. L. REV. 229.

[1] See EWART, ESTOPPEL, 10; BIGELOW, ESTOPPEL, 5 ed., 570.

[2] Brant *v.* Virginia Coal & Iron Co., 93 U. S. 326, 335. See Crary *v.* Dye, 208 U. S. 515, 521; BIGELOW, ESTOPPEL, 5 ed., 617.

[3] Horn *v.* Cole, 51 N. H. 287, 289.

[4] Ross *v.* Ferree, 95 Ia. 604; Cornish *v.* Abington, 4 H. & N. 549, 556. See Jorden *v.* Money, 5 H. L. Cas. 185, 212; EWART, ESTOPPEL, 94.

[5] Stevens *v.* Dennett, 51 N. H. 324, 336. This statement is said to be "bed rock of universal principle, upon which all instances of equitable estoppel must be founded." See 2 POMEROY, EQ. JUR., 3 ed., § 805, n. 1.

[6] By the loose statement that "fraud is essential to estoppel" is frequently meant no more than this: that to allow A to assert against B his right or title would now be equivalent to fraud. See Rice *v.* Bunce, 49 Mo. 231, 235.

claim them against B, to whom X mortgaged the whole herd.[7] What is loosely termed "standing by" presents the third situation. If A, with full knowledge of the circumstances, chooses to remain passive and refrain from asserting his title when he sees his property sold by X, who assumes to own it, to B, an innocent purchaser, A is estopped later to claim it from B.[8] Surely "he who has been silent as to his rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent." [9] A has acted dishonestly in consciously allowing his property to be used to consummate a fraud.[10] But if A is ignorant of his right in the property, the question is entirely altered. In a recent case an illiterate old widower, wholly ignorant of his title to land of his deceased wife, which the children had sold after her death, later discovered and successfully asserted his right to an estate by the curtesy against the apparently innocent vendee. *Dotson* v. *Merritt*, 132 S. W. 181 (Ky.). Innocent non-negligent silence creates no estoppel,[11] not because it is honest — that is immaterial — but because the "stander-by" neither makes nor permits a misrepresentation.[12] He neither holds out nor conceals.[13] His assertion of a subsequently discovered right therefore involves no contradiction of his previous conduct and is now wholly conscionable.

RECENT CASES.

ADVERSE POSSESSION — WHO MAY GAIN TITLE — RELATIVE OF REAL OWNER. — A owned Blackacre and Whiteacre. In 1889 he conveyed the latter to his son. At that time a building on Blackacre also covered a gore-shaped part of Whiteacre. After the Statute of Limitations had run, the land covered by this building was sold on foreclosure to C, who applied for relief from her bid on the ground that the mortgagor did not have title to the gore. *Held*, that relief should be denied. *Timmermann* v. *Cohn*, 44 N. Y. L. J. 1739 (N. Y., Sup. Ct., Jan. 1911).

The law is well settled that after the child attains maturity the father may acquire title against him by adverse possession. *Den* v. *Lane*, 2 N. J. L. 397. So the child may gain title against the parent. *New Haven Trust Co.* v. *Camp*, 81 Conn. 539. Although seldom mentioned, it would seem that the disability of infancy, without reference to the relation of the parties, would protect the child in the majority of cases. Again, the child could not be deprived of his right by the father's fraudulent concealment of the true state of the title. But beyond that the ordinary requisites of adverse possession should suffice. *Scarboro* v. *Scarboro*, 122 N. C. 234; *New Haven Trust Co.* v. *Camp*, *supra*. Hence

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[7] Bank of Holdensville *v.* Kissare, 22 Okla. 545. See EWART, ESTOPPEL, 95.

[8] Pickard *v.* Sears, 6 Ad. & E. 469; Gregg *v.* Wells, 10 Ad. & E. 90. See 18 HARV. L. REV. 140.

[9] *Per* Swayne, J., in Morgan *v.* R. Co., 96 U. S. 716, 720.

[10] Much of the confusion upon the necessity of fraud in the misrepresentation has arisen from stating the rule applicable in cases of passive misrepresentation or "standing by" as if it applied as well to every other case of estoppel.

[11] Willmott *v.* Barber, 15 Ch. D. 96.

[12] Insurance Co. of North America *v.* Miller, 24 Oh. Circ. Ct. 667. See EWART, ESTOPPEL, 88, 89.

[13] It is obvious that other elements necessary to an estoppel are often absent in this class of cases.

cases holding that the rules of adverse possession between strangers are radically modified by the existence of parental and filial relations between the parties can scarcely be supported. *O'Boyle* v. *McHugh*, 66 Minn. 390. A slight inference will naturally be raised by the relation, but a presumption shifting the burden of proof hardly seems necessary for the adequate protection of adult progeny.

BANKRUPTCY — PROVABLE CLAIMS — RIGHTS OF SECURED CREDITOR. — After the filing of the petition in bankruptcy a creditor of the bankrupt liquidated his security, which was not sufficient to satisfy his whole claim. *Held*, that he cannot apply the proceeds first to interest accruing since the filing of the petition, then to principal, and then prove for the balance. *Sexton* v. *Dreyfus* (U. S. Sup. Ct., Jan. 23, 1911).

This reverses the decision in the lower court, criticized in 23 HARV. L. REV. 219.

BILLS AND NOTES — CHECKS — MISAPPLICATION OF FUNDS OF CORPORATION BY OFFICER INDORSING ITS CHECKS. — A, the president of the plaintiff corporation, deposited in the defendant bank to the account of A & Son, a firm of which he was a member, checks payable to the plaintiff corporation, indorsed in blank in its name by "A, president," and then indorsed to the defendant in the name of A & Son. These transactions lasted four months, and included some ninety checks. The plaintiff sued to charge the bank with the amount of these checks, which the bank had allowed A & Son to draw out. *Held*, that the plaintiff can recover. *Niagara Woolen Co.* v. *Pacific Bank*, 141 N. Y. App. Div. 265.

From the form of these checks, it was apparent that the corporation's funds were being used by its president in his private capacity, and those facts were sufficient, especially in view of the large number of checks, to put the defendant upon inquiry as to A's authority. *Squire* v. *Ordemann*, 194 N. Y. 394. See *Capital City Brick Co.* v. *Jackson*, 2 Ga. App. 771. When property is accepted under circumstances which ought to start an inquiry, the holder is charged with notice of all facts which a reasonable inquiry would have disclosed. See *Rochester & Charlotte Turnpike Road Co.* v. *Paviour*, 164 N. Y. 281, 286. Thus it has been held that where a check, signed "X, Agent," is received in payment of a personal debt of X, or where stock in the name of "Y, trustee," is pledged to secure the pledgor's personal debt, the recipient is put upon inquiry by the form of the instruments and accepts them at his peril. *Gerard* v. *McCormick*, 130 N. Y. 261; *Shaw* v. *Spencer*, 100 Mass. 382. The principal case follows a recent New York case which applied the same principles of notice where a bank allowed a treasurer to deposit corporation funds to his individual account, and then check out against it. *Havana Central Railroad Co.* v. *Knickerbocker Trust Co.*, 135 N. Y. App. Div. 313 (reversed on another point in 198 N. Y. 422).

BONDS — INCOME BONDS — WHETHER INTEREST HAS BEEN EARNED. — A railway company that had issued mortgage bonds on which interest was to be paid only as earned, insisted that its earnings during the years in dispute were insufficient to pay the interest. *Held*, that the interest had been earned in spite of the subtlety of the company's bookkeeping. *Central of Georgia Ry. Co.* v. *Central Trust Co. of New York*, 69 S. E. 708 (Ga., Sup. Ct.).

It is always difficult to calculate the true earnings of a corporation, yet it must be done every time a dividend is declared. Ordinarily, however, a stockholder would not question a smaller dividend, for the undistributed earnings, as surplus, would increase the value of his stock. On the other hand income-bond holders would want every possible cent of the earnings paid to them as

interest on their bonds, for otherwise it would be lost to them forever. Their interests are, therefore, directly opposed to those of the directors and stockholders. In the inevitable conflicts that have ensued the courts have favored the bondholders. *Morse* v. *Bay State Gas Co.*, 91 Fed. 938; *Buel* v. *Baltimore, etc. Ry. Co.*, 24 N. Y. Misc. 646; *Schmidt* v. *Louisville, C. & L. Ry. Co.*, 27 Ky. L. Rep. 21. In the principal case the railroad was not permitted to conceal the earnings of a subsidiary company under the guise of a "loan" to itself. Income bonds are now falling into disuse, for they are vain attempts to make their holders both secured creditors of and participators in a single enterprise. They are unknown in England, for the English debenture bond is better adapted to the situation. See 24 HARV. L. REV. 389. In this country the new system of accounting under the Interstate Commerce Commission will probably lessen the number of these disputes, in the case of railroads. The principal case is discussed in its financial aspect in LOUGH, CORPORATION FINANCE, 383.

CEMETERIES — RIGHT OF OWNER OF FEE TO ENJOIN REPEATED TRESPASSES. — One of the avenues of the plaintiff's cemetery ran along the west side of the grounds, with a hedge fence on the west line of this avenue. The defendants, owners of an adjoining cemetery, proceeded to connect their driveways with this avenue by repeatedly destroying the hedge, and by scraping down the road to a level with their own driveways. The plaintiff sued for an injunction. *Held*, that the injunction be granted. *Mount Hope Cemetery Ass'n* v. *New Mount Hope Cemetery Ass'n*, 246 Ill. 416.

The defense was that the plaintiff by platting its lands for cemetery purposes had dedicated the avenues to a public use, so that the defendants had a right to connect their cemetery driveways with those of the plaintiff. It is well recognized that land may be dedicated for a cemetery. *Pierce* v. *Spafford*, 53 Vt. 394. Yet, whatever may be the qualified title or estate of a lot-owner in a lot, the dedicator still retains the fee of the rest of the land, subject only to the easement in the public for cemetery purposes. *Buffalo City Cemetery* v. *Buffalo*, 46 N. Y. 503. And he may maintain trespass for any encroachment on the land which is inconsistent with the proper use of the public easement. *Trustees of First Evangelical Church* v. *Walsh*, 57 Ill. 363. *Cf. Lade* v. *Shepherd*, 2 Str. 1004; *Pomeroy* v. *Mills*, 3 Vt. 279. The driveways are not highways, but a part of the cemetery. *Evergreen Cemetery Ass'n* v. *New Haven*, 43 Conn. 234. Hence an abutting owner can have no right of access. The use to which the abutting owner puts his land makes no difference in principle. Since in the principal case there was no dispute as to the plaintiff's title, the repeated trespasses gave good ground for an injunction. *Carpenter* v. *Gwynn*, 35 Barb. (N. Y.) 395.

CHOSES IN ACTION — GIFTS — DELIVERY OF CERTIFICATE OF STOCK. — The owner of stock in a corporation delivered to his daughter, with the intention of making a present gift, five unindorsed certificates of stock and five sealed instruments, purporting to convey the shares. Some of these deeds contained an express power of attorney to transfer the stock on the books of the corporation, and some did not. *Held*, that the daughter is entitled to all the stock, as against the donor's residuary legatees. *Talbot* v. *Talbot*, 78 Atl. 535 (R. I.). See NOTES, p. 481.

CONFLICT OF LAWS — PERSONAL JURISDICTION — STATUTE AUTHORIZING EXTRATERRITORIAL SERVICE ON RESIDENTS OF STATE. — The defendant, a resident of Iowa, was personally served in South Dakota in compliance with a statute of Iowa which authorized the rendering of a judgment *in personam* against a resident on such service. *Held*, that the statute is unconstitutional. *Raher* v. *Raher*, 129 N. W. 494 (Ia.). See NOTES, p. 486.

CONSIDERATION — WHAT CONSTITUTES CONSIDERATION — PERFORMANCE OF PREËXISTING CONTRACT. — The plaintiff agreed to remodel houses for the defendant. After part performance the plaintiff refused to continue except on the promise of the defendant to change the time of payment. The defendant so promised and the plaintiff continued the work. *Held*, that the defendant's second promise is supported by good consideration. *Tobin* v. *Kells*, 93 N. E. 596 (Mass.).

The plaintiff agreed with one of the defendant's agents, about whose authority there was some question, to publish a guidebook. Later the defendant's duly authorized agent promised to pay the plaintiff's expenses in publishing the guidebook. *Held*, that if the plaintiff was bound by the first promise, the defendant's second promise was without consideration. *Parrot* v. *Mexican Central Ry. Co.*, 93 N. E. 590 (Mass.).

That doing what one is already legally bound to the promisor to do furnishes no consideration is the almost universal rule. *Westcott* v. *Mitchell*, 95 Me. 377; *Ayres* v. *Chicago, Rock Island & Pacific Ry. Co.*, 52 Ia. 478. An early Massachusetts decision, however, held that after the promisee had refused to perform, continuing to perform furnished consideration for the subsequent promise. *Munroe* v. *Perkins*, 9 Pick. (Mass.) 298. The latter of the principal cases would distinguish the former from the general rule on this ground, and would find consideration in that performance was secured instead of a mere right of action. But there is no real distinction. Though the promisee has the power to break his contract, he is legally bound not to exercise that power. *Lingenfelder* v. *Wainwright Brewing Co.*, 103 Mo. 578. Another ground for finding consideration is that the subsequent promise imports a rescission and waiver of the prior contract. *Peck* v. *Requa*, 13 Gray (Mass.) 407. But the facts in a case of this class do not support this theory, for neither party intends to annul the prior contract. See 8 HARV. L. REV. 27. In both principal cases, the promisee suffered no legal detriment, and as to both the view of modern authorities is that the subsequent promise is without consideration. See 17 HARV. L. REV. 71, 79.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — NATURE OF SENTENCE DEPENDENT ON DOCTOR'S CERTIFICATE AS TO HEALTH. — New York Laws of 1910, c. 659, §§ 77, 79, provide for a separate night court for women, and for a medical examination of women who are convicted of vagrancy. If the physician certifies that they are diseased, they are to be committed to a hospital until cured, or for a maximum period of one year. This may be a longer term than they would serve if not diseased. *Held*, that the statute is unconstitutional. *People ex rel. Barone* v. *Fox*, 69 N. Y. Misc. 400 (Sup. Ct.).

The court was undoubtedly correct in saying that there may be separate courts for women, for discrimination between the sexes is generally upheld. *Hoboken* v. *Goodman*, 68 N. J. L. 217; *In re Considine*, 83 Fed. 157. The statute, however, provides no opportunity for the prisoner to contest the correctness of the doctor's certificate as to her condition. The sentence is thus dependent entirely on the decision of a non-judicial officer, and though there is little authority, the court is probably right in declaring this a violation of the Fourteenth Amendment. *Matter of Kenny*, 23 N. Y. Misc. 9. It is unfortunate that this praiseworthy effort of the legislature to alleviate a deplorable condition should be checked in this manner, but the defect may be easily obviated by permitting an appeal from the physician's report. *Cf. People ex rel. Abrams* v. *Fox*, 77 N. Y. App. Div. 245. As this seems to be the first effort by a legislature in this direction, there is no direct authority as to the validity of a statute permitting such an appeal. But as the punishment is directed against all diseased women convicted under this statute, there can be little doubt that such a reasonable discrimination would be upheld. *Cf. People ex rel. Duntz* v. *Coon*, 67 Hun (N. Y.) 523; *Ex parte Liddell*, 93 Cal. 633.

CONSTITUTIONAL LAW — POWERS OF CONGRESS: NATURALIZATION OF ALIENS — CONFLICT OF FEDERAL AND STATE STATUTES. — A federal act provided that certain state courts might take jurisdiction of the subject of naturalization of aliens, and that the clerks of the courts might keep one half of the fees collected, after paying the other half over to the federal government. On the other hand, a Massachusetts statute provided that all of the fees so collected should be paid over to the state. *Held*, that the clerk may keep his share of the fees. *Inhabitants of Hampden County* v. *Morris*, 93 N. E. 579 (Mass.).

As, under the Constitution, Congress is given exclusive jurisdiction over the subject of naturalization, the state courts when acting under its authority can do so only as its agents, and thus all fees collected under such a power must belong to the giver of the power. But these same courts are in fact created by and wholly dependent upon the authority of the state, which may regulate their every activity. *Scott* v. *Strobach*, 49 Ala. 477. So the state may prohibit them entirely from exercising this jurisdiction. *Gilroy, Petitioner*, 88 Me. 199. Again, it can give them any fixed or contingent salary that it deems expedient. So also it would seem that it could even demand compensation for making them the *personae designatae* of the federal act. But it cannot go further and demand money, either in whole or in part, that in right belongs to the federal government. And so as the clause of the Massachusetts statute under consideration fails in part, it fails altogether, and leaves the clerk of the court free to retain the fees in question. *Eldredge* v. *Salt Lake County*, 106 Pac. 939 (Utah).

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES: CLASS LEGISLATION — DISCRIMINATION FAVORING THOSE TREATING BY PRAYER. — The plaintiff was imprisoned for violating a statute requiring practitioners of medicine to have licenses, with a proviso that "nothing herein shall be held to apply or to regulate any kind of treatment by prayer." The plaintiff petitioned for a writ of *habeas corpus* on the ground that the statute was unconstitutional. *Held*, that the writ should be denied. *Ex parte Bohannon*, 111 Pac. 1039 (Cal., Ct. App.).

The ground on which the court bases its decision is that there is no violation of the Fourteenth Amendment because all are equally enabled to engage in such treatment. Such an explanation seems inadequate, for wherever there is class discrimination all may be at liberty to engage in the favored occupation. But police regulations favoring certain classes are not in violation of the Fourteenth Amendment if the discriminations are based on reasonable differences between the classes. *State ex rel. Kellogg* v. *Currens*, 111 Wis. 431. See 15 HARV. L. REV. 491. In the principal case the difference in the mode of treatment, amount of education required, etc., would seem to make the discrimination justifiable.

CONSTITUTIONAL LAW — SEPARATION OF POWERS. — JUDICIAL APPOINTMENT OF EXPERT WITNESSES. — A Michigan statute provided that in homicide cases where the issues involved expert knowledge, the court should appoint one or more suitable disinterested persons to investigate such issues and testify at the trial. The fact that such witnesses had been so appointed was to be made known to the jury. Either side could introduce other witnesses. Experts so appointed testified on the issue of insanity at the trial of the defendant for murder. *Held*, that the statute is unconstitutional. *People* v. *Dickerson*, 129 N. W. 198 (Mich.). See NOTES, p. 483.

EMINENT DOMAIN — WHAT PROPERTY MAY BE TAKEN — PROPERTY DEDICATED TO PARTICULAR USE. — The State of Illinois held in trust land dedicated by the United States for use as a park; and the defendant was an abutting

property owner to whom a statute gave the right to enforce the condition that the park should remain open and vacant. The plaintiffs, under a statute authorizing them to condemn private rights in connection with the building of a museum in the park, petitioned for the condemnation of the defendant's right of easement. *Held*, that the petition be dismissed. *South Park Commissioners* v. *Montgomery Ward & Co.* (Ill., Sup. Ct.), 93 N. E. 910.

It is well settled that the state as grantee of land dedicated to a particular use cannot divert it to a different use. *City of Jacksonville* v. *Jacksonville Ry. Co.*, 67 Ill. 540. But the court in the principal case held further that the state could not by eminent domain condemn the defendant's private right to have the land kept open. If this follows from the acceptance of the land so dedicated, the state has suffered a serious limitation to its powers. But by assuming duties as trustee of land dedicated to a particular use, it does not surrender its sovereign rights. See *New Orleans* v. *United States*, 10 Pet. (U. S.) 662, 723. The right of eminent domain is an attribute of sovereignty which cannot be contracted away or extinguished. *Village of Hyde Park* v. *Oakwoods Cemetery Ass'n*, 119 Ill. 141. Whether or not it is expedient to use the right in a given case is a political rather than a judicial question. *O'Hare* v. *Chicago, etc. R. Co.*, 139 Ill. 151. The principal case, which, it is submitted, is not to be supported, fails to recognize the difference between the powers of the state as trustee and its powers as sovereign. See *United States* v. *Illinois Central Ry. Co.*, 2 Biss. (U. S.) 174.

Equity — Priority of Equities — Purchaser for Value and Without Notice of an Equitable Interest Fraudulently Appointed. — A husband and wife, having under a marriage settlement a power to appoint an equitable interest in personal property among children, appointed to a son who, in accordance with a previous bargain with the appointors, sold his interest to the defendants and paid over to the appointors the money received. The defendants were ignorant of this fraud on the power. Those who were entitled in default of appointment sought to have the appointment set aside. *Held*, that they can do so. *Cloute* v. *Storey*, [1911] 1 Ch. 18. See Notes, p. 490.

Estoppel — Estoppel in Pais–Estoppel Predicted upon an Innocent Misrepresentation. — Land of the plaintiff's deceased wife was sold by the children to the defendant, who apparently was ignorant of the fact that the plaintiff was entitled to an estate by the curtesy. The plaintiff, an infirm and illiterate old man, later discovered his right and brought ejectment. *Held*, that the plaintiff is not estopped to assert his title. *Dotson* v. *Merritt*, 132 S. W. 181 (Ky.). See Notes, p. 494.

Evidence — Dying Declarations — Impeachment. — In a prosecution for homicide the judge refused to charge the jury that the decedent's lack of belief in a future state of rewards and punishments might be considered as affecting the credibility of his dying declarations. *Held*, that the instruction was properly refused. *State* v. *Yee Gueng*, 112 Pac. 424 (Ore.). See Notes, p. 484.

Husband and Wife — Privileges and Disabilities of Coverture — Strict Construction of Statute Giving Separate Rights. — A married woman made a contract with her husband. The plaintiff as her assignee sued the husband under a statute allowing the wife to prosecute or defend suits at law or in equity, either of tort or contract, as if unmarried. Another Maine statute gives a married woman power to contract with her husband. *Held*, that the plaintiff cannot recover. *Perkins* v. *Blethen*, 78 Atl. 574 (Me.).

For a discussion of the principles involved, see 24 Harv. L. Rev. 403.

HUSBAND AND WIFE — RIGHTS AND LIABILITIES OF HUSBAND AS TO THIRD PARTIES — EFFECT OF MARRIED WOMEN'S PROPERTY ACTS ON HUSBAND'S ACTION FOR LOSS OF CONSORTIUM. — In an action by the plaintiff to recover for injuries resulting from an accident, caused by the defendant's negligence, in which both the plaintiff and his wife were injured, he sought to recover damages for the loss of his wife's companionship and services. His wife had recovered full damages for all her injuries in a previous action. *Held*, that, in view of modern legislation regulating the status of married women, the plaintiff cannot recover. *Marri* v. *Stamford Street R. Co.*, 78 Atl. 582 (Conn.).

A recent Massachusetts case reaches the same result. *Bolger* v. *Boston Elevated Ry. Co.*, 205 Mass. 420. The weight of authority, however, under similar statutes, is that the husband may recover, as at common law, for loss of his wife's domestic services. *Thuringer* v. *New York Central & Hudson River R. Co.*, 71 Hun (N. Y.) 526; *Booth* v. *Manchester Street Ry.*, 73 N. H. 529. See 9 HARV. L. REV. 473. But the wife alone can recover for loss of earnings in an independent business. *Riley* v. *Lidke*, 49 Neb. 139. Where the wife assists the husband in his business, her incapacity is usually regarded as his loss. *Standen* v. *Pennsylvania R. Co.*, 214 Pa. St. 189. But it is otherwise where she is regularly paid by him for such services. *Kirkpatrick* v. *Metropolitan Street Ry. Co.*, 129 Mo. App. 524. On principle, the view of the principal case seems in many ways preferable. The wife has no action for loss of her husband's services. *Goldman* v. *Cohen*, 30 N. Y. Misc. 336; *Glenn* v. *Western Union Telegraph Co.*, 1 Ga. App. 821. Moreover, the retention of the husband's action may lead to double recovery for the wife's loss of time from household work. *Perrigo* v. *City of St. Louis*, 185 Mo. 274; *Colorado Springs & Interurban Ry. Co.* v. *Nichols*, 41 Colo. 272. The soundness of the result of the principal case depends upon how far modern statutes have destroyed the fiction of the unity of husband and wife, and it seems not a strained construction that they make them independent at least as against third parties. *Cf. Thompson* v. *Thompson*, 218 U. S. 611; 24 HARV. L. REV. 403.

INJUNCTIONS — ACTS RESTRAINED — BALANCE OF CONVENIENCE DOCTRINE. — The defendant company erected a temporary roundhouse and railroad yards a short distance from the plaintiff's property, the use of which was impaired by the noise, smoke, and cinders resulting therefrom. The court found that the defendant was not negligent and that the improvements contemplated were being pushed to completion with all reasonable speed. The plaintiff sought an injunction and damages. *Held*, that the injunction should not issue. *Herrlich* v. *N. Y. C. & H. R. R. Co.*, 126 N. Y. Supp. 311 (Sup. Ct.).

For a discussion of the principles involved, see 22 HARV. L. REV. 61.

INNKEEPERS — INNKEEPER'S LIEN — WHETHER LIEN ATTACHES TO PROPERTY DEPOSITED FOR A PARTICULAR PURPOSE. — A deposited with the defendant, an innkeeper, as security for a loan, certain tickets which he, as guest, had brought to the inn. The tickets had been stolen from the plaintiff, who brought an action for conversion. *Held*, that he may recover. *Matsuda* v. *Waldorf Hotel Co.*, 27 T. L. R. 153 (Eng., K. B. D., Dec. 14, 1910).

The innkeeper has a lien on any goods brought by a guest for the whole amount due. *Mulliner* v. *Florence*, 3 Q. B. D. 484. And this may be asserted against the true owner if the goods have been stolen. *Robins & Co.* v. *Gray*, [1895] 2 Q. B. 501. Probably also it may be used to enforce repayment of money lent, though lending is not a part of the innkeeper's undertaking. See *Proctor* v. *Nicholson*, 7 C. & P. 67; *Watson* v. *Cross*, 2 Duv. (Ky.) 147. However, it seems that the lien should not attach to property deposited as security for a particular debt. It is a general rule that security deposited for one indebted-

ness may not be held for another. *Duncan* v. *Brennan*, 83 N. Y. 487. Moreover, where bankers have a lien which, like the innkeeper's, enables them to hold any securities for the whole amount due, property deposited for a specific purpose may not be so held. *Neponset Bank* v. *Leland*, 5 Met. (Mass.) 259. On these analogies it seems that the tickets deposited to secure the loan in the principal case could not be used to enforce payment of the other claims, and so the lien does not attach to them. The innkeeper is a mere pledgee from a thief and can assert no rights against the true owner.

INSANE PERSONS — GUARDIANSHIP AND PROTECTION — FALSE IMPRISONMENT. — The plaintiff, the committee of an incompetent person, had allowed the incompetent to live with the defendant for some years. Later he hired him out to A. The defendant took the incompetent from A against the will of the committee and detained him. The plaintiff, in his capacity as committee, sued the defendant for false imprisonment. *Held*, that the plaintiff can recover. *Baker, Committee of Sutliff*, v. *Washburn*, 200 N. Y. 280.

There appears to be no precedent for this action; there are, however, analogous decisions which justify the result. The relation of committee and lunatic is similar to that of guardian and ward, and governed by the same laws. *Holyoke* v. *Haskins*, 5 Pick. (Mass.) 20. An infant ward is always under restraint; but to give ground for an action for false imprisonment the restraint must be unlawful. POLLOCK, TORTS, 8 ed., 221. The test is not the will of the child but the character of the restraint. The restraint of a child against its will by its guardian or one to whom it is properly entrusted is lawful. *Townsend* v. *Kendall*, 4 Minn. 412. But restraint by one against the will of the guardian, even though the child does not object, is unlawful. *Robalina* v. *Armstrong*, 15 Barb. (N. Y.) 247; *Commonwealth* v. *Nickerson*, 5 Allen (Mass.) 518. The principal case is precisely analogous to these cases. If the committee should sue in his own right, he could only recover nominal damages for the interference with his right of custody, for he is not entitled to the earnings of his ward. *Heilman* v. *Martin*, 2 Ark. 158. The form of action in the principal case is therefore best suited to the recovery of full damages.

INSURANCE — CONSTRUCTION AND OPERATION OF CONDITIONS — IMPOSSIBILITY AS EXCUSE FOR FAILURE TO GIVE NOTICE. — The plaintiff held a policy insuring him against sickness, which provided that the insured or his representative must mail notice of sickness within ten days after the commencement of such sickness as a condition precedent to recovery. The plaintiff did not mail notice till a month after the commencement of his illness, but during that time he was delirious. *Held*, that the plaintiff can recover nothing. *Whiteside* v. *North American Accident Ins. Co.*, 93 N. E. 948 (N. Y.).

On the question whether the deranged mental condition of the insured is an excuse for failure to perform the condition of giving notice, three views have been taken. One of the earliest cases holds that the condition must be performed at all events. *Gamble* v. *Accident Ass. Co.*, Ir. R. 4 C. L. 204. The middle view is that the plaintiff can recover, but only for the period beginning ten days before the notice was sent. *Guy* v. *U. S. Casualty Co.*, 151 N. C. 465. But the decided weight of authority, augmented by many recent cases, holds that the plaintiff's disability is a complete excuse, and considers the condition performed if notice is sent within the time stipulated after the removal of the obstacle. *Comstock* v. *Fraternal Accident Ass'n*, 116 Wis. 382; *Hayes* v. *Continental Casualty Co.*, 98 Mo. App. 410. A previous New York case is a leading authority for this doctrine. *Trippe* v. *Provident Fund Society*, 140 N. Y. 23. Courts of law often give relief on equitable principles against the performance of express conditions. Familiar examples are impossibility of performance, and where the defendant himself has prevented the perform-

ance of the condition. *Liverpool, etc. Ins. Co.* v. *Kearney*, 180 U. S. 132; *Batterbury* v. *Vyse*, 2 H. & C. 42. To allow the excuse is the more justifiable when it is considered that the condition was to be performed after the loss insured against had occurred. *Woodmen's Accident Ass'n* v. *Byers*, 62 Neb. 673; *Peale* v. *Provident Fund Society*, 147 Ind. 543.

INSURANCE — DEFENSES OF INSURER — PROPERTY USED IN ILLEGAL BUSINESS. — The defendant insured against fire a house on which the plaintiff held a lien, the policy containing the clause "while occupied as a sporting house." The premium paid was higher than that on a respectable dwelling. The immoral use continued up to the time of the fire. *Held*, that the insured can recover. *Trites Wood Co.* v. *Western Assurance Co.*, 15 West. L. Rep. 475 (Brit. Columbia, Ct. App., Nov. 1, 1910).

The principal difference between this case and the one discussed in 23 HARV. L. REV. 635, is that here "while" is inserted before the words "occupied as a sporting house." This difference makes a construction of the words as a permission instead of a warranty somewhat more strained. For this reason, the present case is even more objectionable than the other.

INTERNATIONAL LAW — NATURE AND EXTENT OF SOVEREIGNTY — FOREIGN VESSELS. — An Act of the Philippine Commission provided that the masters of vessels carrying cattle from any foreign port to any port within the Philippine Islands should provide suitable means for securing such animals while in transit. The master of a Norwegian vessel in Manila Bay was indicted for violating this statute and pleaded lack of jurisdiction in the Philippine court. *Held*, that the court has jurisdiction. *United States* v. *Bull*, 5 Am. J. Int. Law, 242 (Phil. Is., Sup. Ct., Jan. 15, 1910). See NOTES, p. 489.

INTOXICATING LIQUORS — WHAT CONSTITUTES SALE TO CLUB MEMBERS. — The defendant, an incorporated, *bonâ fide* social club, was indicted for the illegal sale of liquor. The manager of the club, at the request of a member, ordered from a dealer outside the state ten dozen bottles of beer, to be shipped to the member in care of the club. The member gave the manager the price of the beer, which amount was put into the club funds, and a check of the club accompanied the order to the dealer. When the beer was received, it was mingled with the other bottles of beer in the club refrigerators, and was put at the member's disposal by means of a coupon system. No charge was made to the member for handling the beer. The club was not an agent of the liquor dealer. *Held*, that a conviction cannot be sustained. *State* v. *Colonial Club*, 69 S. E. 771 (N. C.).

North Carolina maintains the doctrine that a sale of liquor in a *bonâ fide* social club is within a statute forbidding the sale of liquors. *State* v. *Lockyear*, 95 N. C. 633; *State* v. *Neis*, 108 N. C. 787. But here the agency of the club in ordering and receiving did not vest title in the club. *Wright* v. *State*, 35 Tex. Cr. Rep. 581; *Hogg* v. *People*, 15 Ill. App. 288. Nor does depositing the beer with the club change the title. *State* v. *Wingfield*, 115 Mo. 428; *Potts* v. *State*, 96 S. W. 1084 (Tex.). The mingling of the bottles bears a clear analogy to the grain elevator cases, and such a tenancy in common is possible. *Moses* v. *Teetors*, 64 Kan. 149. See WILLISTON, SALES, § 154; 6 AM. L. REV. 450. Beer bottles of the same brand must be considered fungible. *Cf. Pleasants* v. *Pendleton*, 6 Rand. (Va.) 473. The coupons are merely warehouse receipts, and this transaction is not a sale. *Commonwealth* v. *Smith*, 102 Mass. 144. Nor is this a colorable evasion of the law. But *cf. Rickart* v. *People*, 79 Ill. 85. If the legislature desires to prevent the presence of liquor in a club, it may easily do so. *Cf. State* v. *Kapicsky*, 105 Me. 127. The dissenting judges have confused

the difference between ordinary chattels and money. A depositor in a bank loses title to the money, but a depositor of chattels in a warehouse or grain in an elevator retains the title.

JUDGMENTS — OPERATION AS BAR TO OTHER ACTIONS — DAMAGE TO PERSON AND PROPERTY CAUSED BY ONE NEGLIGENT ACT. — The plaintiff, while riding in his wagon, was run into by the defendant's trolley car and injured personally. His horse and wagon were also damaged, for which he recovered judgment. *Held*, that this bars an action for the personal injuries. *Ochs* v. *Public Service Ry. Co.*, 77 Atl. 533 (N. J., Sup. Ct.). See NOTES, p. 492.

PLEADING — DAMAGE TO PERSON AND PROPERTY BY ONE NEGLIGENT ACT AS ONE CAUSE OF ACTION. — The plaintiff sued to recover damages for personal injuries and damage to his horse and buggy, both sustained in a collision caused by the defendant's negligence. The defendant moved to state separately the alleged causes of action. *Held*, that there was but one cause of action stated. *Bilikan* v. *Columbus Railway and Light Co.*, 20 Oh. Dec. 609 (Ohio, Franklin Common Pleas). See NOTES, p. 492.

PLEADING — THEORY OF THE PLEADING. — The plaintiff in his complaint set forth a cause of action for negligence and then sought to amend so as to recover under a statute. *Held*, that he may do so. *Birt* v. *Southern R. Co.*, 69 S. E. 233 (S. C.). See NOTES, p. 480.

POLICE POWER — NATURE AND EXTENT — PROHIBITION OF PICKETING. — The plaintiff was arrested for violation of an ordinance making it a misdemeanor to picket for the purpose of intimidating, threatening, and coercing employees. He petitioned for a writ of *habeas corpus*. *Held*, that the writ should be denied as the statute is constitutional. *Ex parte Williams*, 111 Pac. 1035 (Cal., Sup. Ct.).

According to this case a man can commit a peaceable act of picketing not partaking of the character of a nuisance and be guilty of a criminal offense. Yet the decision seems sound, for within the police power there may be forbidden a fringe of acts harmless in themselves, without violation of the Fourteenth Amendment. Where a remedial act is broader in its scope than is absolutely essential for the public welfare it will not be overthrown, if a general uniformity is thereby attained which is necessary for its effectual administration. *Compagnie Française de Navigation à Vapeur* v. *Louisiana State Board of Health*, 186 U. S. 380.

RECEIVERS — LIABILITY FOR RECEIVERSHIP EXPENSES — FUNDS INSUFFICIENT. — The plaintiff was appointed a receiver in an action for the dissolution of a partnership. In carrying on the business he incurred expenses which the assets were insufficient to satisfy, and he therefore claimed reimbursement from the original parties. *Held*, that he cannot recover. *Boehm* v. *Goodall*, [1911] 1 Ch. 155.

A receiver is an officer of the court, appointed by it, and responsible to it alone. *In re Flowers & Co.*, [1897] 1 Q. B. 14. He is not an agent of the company and may be personally liable on the contracts he makes. *Burt, Boulton, & Hayward* v. *Bull*, [1895] 1 Q. B. 276. And the executory obligations of a corporation do not descend upon him unless he elects to assume them. *Central Trust Co.* v. *East Tennessee Land Co.*, 79 Fed. 19. His management is so distinct that liens exercisable against the company are not enforceable against him. *Whinney* v. *Moss Steamship Co.*, [1910] 2 K. B. 813. Hence the basis of the principal decision is the injustice in charging the receiver's expenses upon those having no control over him. A similar result is reached by some American courts. *Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360. But others place the

loss on the original parties. *Knickerbocker* v. *McKindley Coal & Mining Co.*, 67 Ill. App. 291. So the directors of a corporation may look to the shareholders for reimbursement. *Ex parte Chippendale*, 4 De G. M. & G. 19. Such is also the rule between trustee and *cestui que trust*. *Hardoon* v. *Belilios*, [1901] A. C. 118. It is submitted that the true basis of the receiver's right is quasi-contractual, for money paid to the use of the parties, the recovery depending on the necessity and expediency of his acts. On this ground the decisions could also be reconciled.

RECORDING AND REGISTRY LAWS — WHAT CONSTITUTES RECORDING — WRONG INITIAL OF MORTGAGOR'S MIDDLE NAME FATAL TO NOTICE. — W. N. McDonald executed a chattel mortgage, signing it "W. H. McDonald." *Held*, that the recording of this mortgage was not constructive notice to a subsequent *bonâ fide* purchaser from W. N. McDonald. *First National Bank of Opp* v. *Hacoda Mercantile Co.*, 53 So. 802 (Ala.).

A misunderstanding of the phrase "A man cannot have two names of baptism" has led to a strange confusion of reasoning in many of the modern cases. *Cf. Nolan* v. *Taylor*, 131 Mo. 224; *Franklin* v. *Talmadge*, 5 Johns. (N. Y.) 84. The old common law recognized no *alias* of a person's Christian name. BROOKE, ABR., "Misnomer," 2, 4; CO. LIT. 3 a; *Fermor* v. *Dorrington*, Cro. Eliz. 222; *Rex* v. *Newman*, 1 Ld. Raym. 562. The conception was simply that at baptism a person received once and for all the Christian name or names, and any subsequent addition or substitution could not be a name "of baptism." See VINER'S ABR., "Misnomer," C. 6, pl. 5, 6. It may even be doubted whether the rule was as strict as this. See *Bearbrook* v. *Read*, 1 Brownl. & G. 47; *Walden* v. *Holman*, 6 Mod. 115; BACON'S LAW TRACTS 106. But there is no authority for the frequently repeated statement that the old common law did not recognize a person's middle Christian name. Hence, in any legal situation, where a person's name is of importance, it should first be recognized that his exact name does include the middle Christian name. *Commonwealth* v. *Perkins*, 18 Mass. 388; *Bowen* v. *Mulford*, 10 N. J. L. 230. But if the identity can be otherwise satisfactorily determined, it may be unnecessary to require that the exact name be used. See *Commonwealth* v. *Shearman*, 65 Mass. 546. However, taking into consideration the purpose of recording statutes, and the absence, apart from the record, of means of identifying the parties, the principal case seems clearly right and is supported by the weight of authority. *Crouse* v. *Murphy*, 140 Pa. St. 335; *Johnson* v. *Wilson & Co.*, 137 Ala. 468. *Contra*, *Fincher* v. *Hanegan*, 59 Ark. 151; *Geller* v. *Hoyt*, 7 How. Pr. (N. Y.) 265.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST ACT — CONSPIRACY A CONTINUING OFFENSE. — The defendants were indicted for a conspiracy in restraint of trade in violation of the Sherman Act. Their plea of the Statute of Limitations put in issue whether or not a conspiracy is a continuing offense. *Held*, that a conspiracy is a continuing offense. *United States* v. *Kissel*, U. S. Sup. Ct., Dec. 12, 1910.

The question of what constitutes a conspiracy has frequently come up under a federal statute making a conspiracy to defraud the government and an overt act in accordance therewith an indictable offense. U. S. REV. STAT., 1878, § 5440. Several decisions have held that the conspiracy is merely the agreement to defraud, so that if the limitation period has elapsed since the commission of an overt act in accordance with this agreement the defendants can no longer be indicted, though they have committed subsequent overt acts. *United States* v. *Owen*, 32 Fed. 534; *United States* v. *McCord*, 72 Fed. 159. Other cases hold that a conspiracy is a continuing offense, consequently an indictment is maintainable if any overt act has been committed within the statutory period. *United States* v. *Bradford*, 148 Fed. 413; *United States* v.

Brace, 149 Fed. 874. The present determination by the Supreme Court in accordance with the latter view seems clearly correct, for the rational meaning of the word "conspiracy" is not merely an agreement of parties but their continued acting together for a wrongful purpose. The offense under the Sherman Act exists without the additional element of an overt act, so the statute begins to run only when the common wrongful design has actually been abandoned.

SURETYSHIP — CO-SURETIES — CONTRIBUTION: BASIS OF APPORTIONMENT. — The plaintiff had agreed to indemnify a bank for any losses up to $2500 arising from dishonesty of its employee, K. The defendant was a subscriber on a Lloyd's policy for £40,000, which insured the bank against losses caused by dishonesty of employees, loss of securities by negligence, fire, theft, or burglary. K. misappropriated $2680, and the plaintiff, having paid the amount due, sued for contribution from the defendant. *Held*, that the defendant must contribute, and the whole loss is to be divided between the two policies in the ratio of 2680 to 2500. *American Surety Company of New York* v. *Wrightson*, 103 L. T. R. 663 (Eng., K. B. Div., Nov. 15, 1910). See NOTES, p. 487.

SURETYSHIP — STATUTE OF FRAUDS — ORAL PROMISE BY STOCKHOLDER TO PAY DEBT OF CORPORATION. — The defendant, a heavy stockholder and the president of a corporation, orally promised to pay the plaintiff a debt of the corporation, if the plaintiff would continue to deliver goods to the corporation. *Held*, that the Statute of Frauds is a good defense. *Hurst Hardware Co.* v. *Goodman*, 69 S. E. 898 (W. Va.).

The decided weight of authority permits a recovery on an oral promise to answer for the debt of another, if the promisor receives a benefit substantially equivalent to that which he has promised. *Williams* v. *Leper*, 3 Burr. 1886; *Raabe* v. *Squier*, 148 N. Y. 81. But see *Fullam* v. *Adams*, 37 Vt. 391. This is within the letter of the statute, and there seems to be no theoretical justification for allowing a recovery on the promise. See 23 HARV. L. REV. 136. Often, little harm is done by such a recovery, for a quasi-contractual action for the benefit rendered would reach the same result. But many courts have allowed a recovery even though the benefit to the defendant is considerably less, or conjectural, if the main intent of the promisor was to serve his own interests. *Davis* v. *Patrick*, 141 U. S. 479; *Wills* v. *Cutler*, 61 N. H. 405. When a corporation is the principal debtor a logical conclusion from this is to hold the defendant if he is a large stockholder. *Emerson* v. *Slater*, 22 How. (U. S.) 28; *Choate* v. *Hoogstraat*, 105 Fed. 713. The weight of authority, however, has required the benefit to the promisor to be direct and not merely an enhanced value of his stock. *Walther* v. *Merrell*, 6 Mo. App. 370; *Mechanics & Traders' Bank* v. *Stettheimer*, 116 N. Y. App. Div. 198. Such a refinement can only only be explained as a desire to limit this anomalous doctrine as much as possible.

TAXATION — COLLECTION AND ENFORCEMENT — EQUITY JURISDICTION. — A *bonâ fide* holder of a duly authorized county bond, having obtained judgment against the county, which by various devices had succeeded in evading payment, filed a bill in equity against the defendant railroad which was a taxpayer of the county. He alleged that the assessment of the defendant's property toward the payment of the judgment created a lien in his favor which he was entitled to foreclose. The defendant demurred on the ground that the tax could be recovered only by the proper local official, as provided by statute. *Held*, that the demurrer must be sustained. *Preston* v. *Chicago, St. Louis, & New Orleans R. Co.*, 183 Fed. 20 (C. C. A., Sixth Circ.).

This decision affirms that of the Circuit Court discussed in 23 HARV. L. REV. 647.

TRIAL — VERDICTS — VALIDITY OF VERDICT RENDERED AFTER DISCHARGE OF JURY. — In an action for negligence, the court submitted to the jury the questions of the defendant's negligence, the plaintiff's contributory negligence, and the damages, instructing them that if they found either of the first two questions in favor of the defendant, they need not discuss the third. The jury disagreed on the third question and were duly discharged. Immediately thereafter it was discovered that they had found the plaintiff guilty of contributory negligence, so they were called back into the box, and their verdict was taken for the defendant. Thereupon the plaintiff moved for a new trial. *Held*, that the motion be denied. *Rippley* v. *Frazer*, 69 N. Y. Misc. 415. (Sup. Ct.).

A recent New York case held under similar circumstances that where by mistake a disagreement has been entered upon the record the affidavits of the jurors as to their findings are admissible to correct the record. *Wirt* v. *Reid*, 138 N. Y. App. Div. 760. For a discussion of the principles involved, see 24 HARV. L. REV. 162. The situation in the principal case is analogous, but taken at an earlier stage in the proceedings. And though it may be severe, logically it seems difficult to get away from the fact that the jury has been discharged without rendering any valid verdict, and that therefore there has been a mistrial. See *Fisk* v. *Henarie*, 32 Fed. 417, 427.

BOOK REVIEWS.

YEAR BOOKS OF EDWARD II. Vol. V: THE EYRE OF KENT, 6 & 7 Edward II (being the 24th volume of the Selden Society publications). Edited by the late Frederic William Maitland, the late Leveson William Vernon Harcourt, and William Craddock Bolland. London: Benard Quaritch. 1910. pp. cii, 232 [422].

This volume contains the first portion (including the pleas of the crown) of the Kentish Eyre of 1313–14. It is a real year book, not the roll of the eyre, like Maitland's Pleas for Gloucester. It gives us therefore, for the first time in print, a description of the actual proceedings in the eyre, in several parallel versions, each supplementing and confirming the others; for the manuscripts are numerous, and fall into at least four classes, indicating as many original reports.

The eyre lasted for a year. The judges journeyed to Canterbury and opened the eyre with great formality. Proclamations were made, the commission read, the articles of the eyre were opened, and the jurors charged and retired for a few days to prepare their presentments. Then the franchises were claimed, and allowed or disallowed according to the record of the preceding eyre, twenty years before. Then, with the presentments of the jurors, the judicial business begins. This business is of the same sort that we find in the published rolls of the thirteenth and early fourteenth century; but the record is illuminated by the remarks of the judges from time to time, and with the arguments of counsel. It is a vivid and illuminating picture of the administration of justice at the time.

The editorial work is well done. Mr. Bolland has written a scholarly introduction. We of course miss the master-touch of his great predecessor; but his work brings promise of excellent results in time to come. It is a satisfaction to find again such cogent proof that no man, however great, is indispensable.

J. H. B.

THE LAW OF LANDLORD AND TENANT. By Herbert Thorndike Tiffany. In two volumes. St. Paul. The Keefe-Davidson Co. 1910. pp. xxiv, 1255; xxiii, 1257–2343.

This treatise stands out as a distinct addition to our common-law literature, covering as it does an important subject both exhaustively and with discrimination.

The great length of the work is not, as has too often been the case with our manuals of law, indicative of information undigested and therefore prolonged and confused in the imparting. The wealth of material at the author's disposal has evidently been thoroughly considered; and the results worked in upon a framework resulting from thorough analysis of the subject. The book is admirably adapted to the needs of the practicing lawyer, for the author has neither hesitated to express his own views nor failed to pay due respect to that law which owes its existence to the decisions of courts.

A minute examination of the author's treatment of a few questions shows an inconsistency between his statement on page 866 that a grantee of the fee takes subject to a lease not within the recording laws though he be a purchaser for value and without notice of the lease, and his statement on page 1274 that of two successive lessees the second, being without notice of the first, would take priority, — an inconsistency made more striking by the fact that the author, for authority for his second statement, refers to the citations noted for the first. The explanation of the inaccuracy of the latter statement is probably due to an unindicated assumption that the leases were subject to a recording act.

The subject of the respective rights of a transferee of future rent and a subsequent purchaser of the reversion is fully presented. The correct solution of the problem would seem to lie in recognition of the fact that rent is an interest in land and as such subject to the recording act, so that while a recorded transfer of rent or a transfer not within the recording act would take priority in all cases, a transfer which was within the recording act and not recorded would take priority over only such subsequent purchasers for value of the reversion as were chargeable with notice. This principle, which, of course, applies only to legal transfers of the rent as distinguished from equitable, is apparently recognized and, on p. 1112, endorsed by the author. Nevertheless in expressing his conclusions on the matter, on p. 1115, he seems to overlook or reject it, saying that the most equitable adjustment may be had "by applying the ordinary rules determining priorities as between *bonâ fide* purchasers."

The arrangement of the volumes is very good. Each begins with long chapter analyses, very full, arranged with headings, sub-headings, and so on. Each main heading of the several chapters is made a section of the book, with the result that the sections are very long, especially those covering the more important points. This is of some importance in affecting ease of reference, especially as the index is poor, but the chapter analyses are so full that little difficulty is experienced on this point.

The book is recommended as one that will be of great value in practice, in finding the authorities and in aiding in analysis. A. R. G.

A TREATISE ON THE DE FACTO DOCTRINE IN ITS RELATION TO PUBLIC OFFICERS AND PUBLIC CORPORATIONS. By Albert Constantineau, B.A., D.C.L., Judge of Prescott and Russell, Ont. Rochester, N. Y.: The Lawyers' Co-operative Publishing Company. 1910. pp. xciii, 750.

Unless the title of this book is somewhat carefully scrutinized, its subject will seem to be larger than it really is. It is not a treatise on the *de facto* doc-

trine generally, but merely upon public offices and officers *de facto*, with such attention to *de facto* public corporations as is necessary in dealing with the office *de facto*. Although it bears the sub-title of "Extraordinary Legal Remedies," its treatment of that subject is confined to a brief discussion of the remedies employed in testing the rights and title of the officer *de facto*. Out of this rather narrow subject, by means of extensive statements of, and quotations from, the cases, aided by the use of a rather small page liberally spaced, a considerable volume has been produced.

The author is a Canadian judge, who, while he purports to write for any jurisdiction using the English common law, finds his material almost wholly in the United States. This he explains by the fact that the question has been but little developed in Canada and England, while it has been a prolific subject of litigation in the United States for a hundred years. The author's investigation of the American cases seems to have been thorough and exhaustive, though few are cited later than the official reports. Parallel references are given to all of the leading collateral reports. The author justifies his full statement of the cases, and his liberal quotations from them, upon the ground that most of the lawyers for whom he writes do not have access to large libraries.

The author has made an intelligent and well analyzed use of his materials. He displays a strong grasp of the subject; conflicting views are carefully stated, and the author's own conclusions are set forth in such a way that, if they do not always carry conviction, they cannot fail to command respect. The net result, as the reviewer is pleased to be able to say, is a good and useful book upon a subject of difficulty and importance.

F. R. M.

LAW OFFICE AND COURT PROCEDURE. By Gleason L. Archer. Boston: Little, Brown & Company. 1910. pp. xv, 311.

The author of this book considers it "one of the gravest reproaches of American Law Schools that their graduates know nothing of how to practice law upon admission to the bar," and the object of this volume is to give the victim of our present system of legal education an insight into the customs of law offices and courts. The plan of the book is to trace the ordinary lower court case through the various steps from the time the client enters the office until the case is appealed to the highest court. Advice is given as to the customs of lawyers, each step is illustrated with concrete examples, and there is a very full set of forms.

For the lawyer who has practiced six months, the book contains little of value. As a manual of practice it is inadequate, for it contains nothing that is not more fully and more usefully presented in the standard books of practice. The sections which give advice as to the customs of law offices and lawyers are brief and commonplace, and it is a pity that the author did not leave the rules of practice for the already existing manuals and expand more upon this interesting field which has never been systematically written up. Most beginners have more difficulty in knowing what and how to charge a client than in learning the rules of procedure. A disproportionally large part of the book is taken up with examples of direct and cross examination. The examples lack value for the young practitioner, because they are mostly taken from sensational criminal trials, and they fail to hold the attention of a reader who has ever enjoyed Mr. Wellman's books.

All young lawyers, however, would do well to peruse this book between graduation from law school and the beginning of practice. It will save much needless worry about the unknown field of practice and will enable the beginner to take up his first small tort or collection case with greater confidence.

H. M. H.

CASES ON ADMINISTRATIVE LAW. By Ernst Freund. American Case Book Series. James Brown Scott, General Editor. St. Paul: West Publishing Company. 1911. pp. xxi, 681.

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(II) CRIMINAL PSYCHOLOGY. By Hans Gross. Translated from the Fourth German Edition by Horace M. Callen. pp. xx, 514.

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RELEASE AND DISCHARGE OF POWERS.

THE extinction of a power is generally effected or attempted by a release of the power to a person who has an interest in the property over which the power exists; as when a life tenant having a general power of appointment by deed or will releases the power to the remainderman.

But a power may also be extinguished by the donee of the power dealing with the property over which the power exists in a way which estops him to exercise the power, as when A, having an estate in fee simple and also a power appendant, conveys the land to a purchaser. Here, although A does not purport to release the power, he can no longer exercise it; the power is extinguished.

Although the form of such an extinguishment of a power is different from that of a release, it amounts to the same thing; in substance it is a release of the power to the person to whom the land is conveyed, and hence such extinguishments and releases can be considered together.

The first distinction in powers rests on the nature of the instrument by which the power is exercisable. It may be exercisable by either deed or will, or by will alone. A power may be made exercisable by deed and not by will, but the law as to releases is the same in the case of powers of this description as it is in that of powers exercisable by either deed or will. For the essential difference is whether the power can be exercised at once, or only on the death of the donee.

Again, powers are either general or special. Under a general power an appointment can be made to any one, including the ap-

pointing donee. Under a special power an appointment can be made only to certain persons or objects, or to certain classes of persons or objects other than the donee. Special powers are sometimes called limited powers.

Finally, the relation between the donee and the property over which he has the power of appointment may be one of four kinds: *First.* The donee may have an interest in the property from which the exercise of the power will derogate, as when the donee of the power owns the property in fee. This is called a power appendant. *Second.* The donee may have an interest in the property, but the exercise of the power will not derogate from such interest, as when A has a life estate, with power to appoint by will. This is called a power in gross or collateral. *Third.* The donee has no interest in the property, but has himself created the power, as when a man conveying land in fee reserves to himself a power of appointment. This is also called a power in gross or collateral; to distinguish it from the power of the second kind, it will be called here a reserved power in gross. *Fourth.* The donee has no interest in the property and did not create the power. The power in this case is said to be simply collateral.

This somewhat clumsy nomenclature is derived from an opinion of Hale, C. B., in Edwards *v.* Sleater.[1]

These classes of cases will be considered in the following order.

I Powers Appendant
II Powers Simply Collateral
III Reserved Powers in Gross
IV Powers in Gross

and under each of these heads will come —

(*A*) *General powers exercisable by either deed or will;*
(*B*) *Special powers exercisable by either deed or will;*
(*C*) *General powers exercisable by will only;*
(*D*) *Special powers exercisable by will only.*

In all, sixteen classes of powers.

[1] Hardr. 410, 415, 416.

I.

Powers Appendant.

An estate in fee and a power appendant may subsist in the same person.

Thus, A may convey land to such uses as he shall appoint, and until appointment to himself in fee; or he may simply convey to such uses as he may appoint, in which case he will have a resulting use in fee.

Whatever doubt may have at any time existed, the strong opinion of Lord Eldon, C., in Mandrell *v.* Mandrell,[2] has settled that the fee and a power may coëxist in the same person.[3]

In Cross *v.* Hudson[4] an estate was conveyed to A for life, with remainders over, and an ultimate remainder to the survivor of himself and his wife in fee; and A had a power to appoint. His wife died in his lifetime, and all the intervening remainders became incapable of taking effect, so A was seised in fee. He appointed by will. Lord Thurlow, C., thought that the power was merged in the fee. But the true ground of the decision was not that there was a merger or extinction of the power, but that it was intended that the power should continue only during the existence of the intermediate estates and should cease when the ultimate remainder vested. It was a question of construction based on intention.[5]

If a power is appendant, a conveyance of the interest to which the power is appendant extinguishes the power. The donee of the power cannot derogate from his own grant.[6]

But if one having an estate in fee, and also a power appendant, makes a conveyance which is conditional, like a mortgage, or which passes only a partial interest, like a lease, although he cannot, by exercising the power, derogate from the title of the mort-

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[2] 10 Ves. 246, 256, 257 (1804).

[3] See Glass *v.* Richardson, 9 Hare 698, 702; Sugden, Powers, 8 ed., 93 *et seq.*; Farwell, Powers, 2 ed., 38; Leake, Land Law, 381.

[4] 3 Bro. C. C. 30.

[5] See Wolley *v.* Jenkins, 23 Beav. 53 (1856); Sugden, Powers, 8 ed., 99, 859; Leake, Land Law, 382; Gray, Rule against Perpetuities, § 497.

[6] Leake, Land Law, 383.

gagee or the lessee, he can still exercise the power, subject to that title.[7]

Sometimes a power is in part appendant, and in part in gross, as when a tenant for life has a power to lease or to sell. Here a conveyance by him of his life estate will prevent him from exercising the power as against the grantee of the life estate, but he can still exercise it against the remaindermen.[8]

Lord St. Leonards has some observations adverse to the right of a tenant for life to exercise powers of leasing or of sale and exchange after parting with his estate for life.[9] But the court, in Alexander *v.* Mills,[10] says:

"The only thing really pressed upon us against these decisions is that Lord St. Leonards, in successive editions of his work on Powers, has treated each case as limited to the circumstances of that case, and has declined to recognize them as establishing the broad principle that, as long as nothing is done in derogation of the alienee's estate, the alienation has no operation on the power. We cannot set this limitation on the part of this eminent author against the judicial decisions themselves."

A man's right over his property cannot be interfered with by giving him a power, and if he cannot dispose of his property his rights over it are interfered with. Therefore, it is immaterial whether a power appendant is to be exercised by deed or will, or by will only, or whether it is a general or a special power.[11]

In Cunninghame *v.* Thurlow[12] A had an exclusive power to appoint, by deed or will, personal property in which he had a life interest to his children. The gift in default of appointment was to the children. One of the children died, having appointed A executor, and bequeathed to him his personal property. The share of the child in the property, in default of appointment, was thus vested in A, and the power, as to this share, became appendant. A appointed four-fifths of the fund, and released his power over the part not appointed. He then applied to have his share of the non-appointed part paid over to him. Shadwell, V. C., although

[7] Alexander *v.* Mills, L. R. 6 Ch. 124; Hardaker *v.* Moorhouse, 26 Ch. D. 471; Farwell, Powers, 2 ed., 30; Leake, Land Law, 384.

[8] Jones *v.* Winwood, 4 M. & W., 653.

[9] Sugden, Powers, 8 ed., 66 *et seq.*

[10] L. R. 6 Ch. 135.

[11] Hurst *v.* Hurst, 16 Beav. 372; Piers *v.* Tuite, 1 Dr. & Walsh 279.

[12] 1 Russ. & M. 436, note (1832).

he thought the power was extinguished, declined "to give effect to the release, so far as it operated to vest a share of the fund in the father."

But in Smith *v.* Houblon,[13] where a life tenant had an exclusive power to appoint to his children, with a gift over in default of appointment to the children, one of the children died, the father mortgaged the share which he took as administrator of the child, and released his power of appointment to the mortgagees. Sir John Romilly, M. R., held that the power was released as to this share. And in *In re* Radcliffe, the Court of Appeal approved Smith *v.* Houblon, and declined to follow Cunninghame *v.* Thurlow.[14]

Does the bankruptcy of the donee extinguish a power appendant? The answer must depend largely upon the words of the particular Bankrupt Act.

As a general question, apart from special provisions, it may be said that the assignee steps into the shoes of the bankrupt, and that a conveyance by the assignee must have the same effect as a conveyance by the bankrupt; and it is held in England that an assignment in bankruptcy extinguishes a power appendant.[15]

But as an open question this may well be doubted. When a man, having the fee and a power appendant, conveys the fee, the reason why the power is extinguished is, that he is estopped to derogate from his grant; but if the transfer of the property is *in invitum*, there would seem to be no estoppel; and it has accordingly been held that if A is tenant in fee, and has also a power appendant, judgment and execution on the land will not extinguish the power.[16]

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[13] 26 Beav. 482 (1859).

[14] [1892] 1 Ch. (C. A.) 227; and see *In re* Selot's Trust, [1902] 1 Ch. 488, 493. But *cf. In re* Little, 40 Ch. D. 418.

[15] Doe *v.* Britain, 2 B. & Ald. 93; Hole *v.* Escott, 2 Keen 444; s. c. 4 Myl. & Cr. 187.

[16] Doe *v.* Jones, 10 B. & C. 459; Eaton *v.* Sanxter, 6 Sim. 517; Skeeles *v.* Shearly, 8 Sim. 153; 3 Myl. & Cr. 112; Leggett *v.* Doremus, 25 N. J. Eq. 122. See The Queen *v.* Ellis, 19 L. J. Ex. 77.

II.

Powers Simply Collateral.

Such powers, if special, cannot be released.[17] This has been held *semper, ubique et ab omnibus.*

Powers simply collateral, if general, that is, which are exercisable in favor of the donee, if exercisable by deed or will, can be released. In fact a release by the donee is equivalent to an appointment by him.

Suppose we have now a power simply collateral, which is general, but which can be exercised by will only. In this case the decision must be the same as in the case of general powers in gross. General powers in gross exercisable by deed or will can be released; if they cannot be released when testamentary, this must be solely on account of their testamentary character, and whether such testamentary character does or does not affect them is the same question in the case of powers simply collateral as arises in the case of powers in gross, and will be considered with the latter.

At the present time, in England, by statute,[18] "A person to whom any power, whether coupled with an interest or not, is given may, by deed, release or contract not to exercise the power."

III.

Reserved Powers in Gross.

We have seen that under the general head of powers in gross are classed not only powers where the donee has an interest in the land over which the power exists, but also powers where the donee has created the power upon conveyance of the fee, and propositions about the releasability of powers in gross are expressed in general terms applicable to both kinds. Almost all the instances of the release of powers in gross discussed in the books are where the donee of the power has an interest in the land, and I know no sufficient reason why the law as to the releasability

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[17] Sugden, Powers, 8 ed., 49.

[18] St. 44 & 45 Vict. (1881), c. 41, § 52.

of a reserved power in gross should differ from that of a power in gross where the donee has an interest in the land. I pass therefore to the consideration of the latter class.

IV.

Powers in Gross.

General powers in gross exercisable by either deed or will can be released. In fact a release of such a power is equivalent to an appointment.

There remain two questions:

Can special powers be released?

Can testamentary powers be released?

The case of a special testamentary power in gross presents both questions.

(A) *Can special powers in gross be released?*

A common case of a special power of appointment in gross is when a tenant for life has an exclusive power of appointment by either deed or will to his children, and the gift in default of appointment is to the children in fee. Here the tenant in life can release to the children, for such a release is, in effect, an appointment to them.[19]

The difficult case arises when those who take the property in default of appointment are different from those to whom the appointment can be made. As, for instance, when A, tenant for life, has a power to appoint to his children, but the gift in default of appointment is to B, and A releases his power to B.

As I have said, it is universally agreed that a special power simply collateral cannot be released by the donee.

Why should not the law be the same with a power in gross?

Let us take two typical cases. (1) To A for life, on his death as he shall by deed or will appoint to his children or grandchildren, and, in default of appointment to his children. Here A has a power in gross. (2) To A for life, on his death as B shall appoint by deed or

[19] This was the case in Smith *v.* Plummer, 17 L. J. Ch. 145; Walford *v.* Gray, 11 Jur. N. S. 106, 473; and Foakes *v.* Jackson, [1900] 1 Ch. 807.

will to A's children or grandchildren, and in default of appointment to the children of A. Here B has a power simply collateral. In both cases there is a life estate and a remainder. In neither case does the exercise of the power affect the life estate. In both cases its exercise derogates from the remainder in precisely the same way. The only difference is that in the first case A has, and in the second case B has not, any interest in the property over which the power exists, but as the exercise of the power cannot affect A's interest it would seem that this circumstance is immaterial, and that special powers in gross, like special powers simply collateral, should be non-releasable.

And that there is no reason for distinguishing them is indicated by the English statute above cited, which makes all powers releasable without regard to whether they are in gross or simply collateral.

But although this seems pretty obvious, the course of decision in England has not been in accordance with it, and donees of special powers, even of testamentary powers, have been allowed to release them.

How did this come about?

It arose out of the law as to tortious conveyances. Whether a special power in gross was extinguished by a tortious conveyance such as a feoffment or a fine was a matter much disputed in the profession, but that it could be so extinguished by a fine was settled by the careful *dicta* of Vice-Chancellor Leach in West *v.* Berney,[20] followed by his decision in Smith *v.* Death.[21] and his decision as Master of the Rolls in Bickley *v.* Guest.[22]

It has been suggested that a power in gross was extinguished, at common law, by a tortious conveyance, because a new estate was created by the tortious conveyance; the old estate was divested; the seisin out of which the estates of the appointees were to be fed was destroyed, and therefore the power became extinct. But an objection to this explanation is that the estates of the appointees taking under powers simply collateral must also be fed out of the original seisin, and yet such powers are not extinguished by a tortious conveyance.

The better reason seems to be that given by Vice-Chancellor

[20] 1 Russ. & M. 431 (1819).
[21] 5 Mad. 371 (1820).
[22] 1 Russ. & M. 440 (1831).

Leach in Smith *v.* Death.[23] He says that the grantee or devisee for life "could deal with the estate in respect of his freehold interest; and his dealing with the estate, so as to create estates inconsistent with the exercise of his power, must extinguish his power, upon the general principle that a person is not permitted to derogate from his own grant." That is, the tenant for life, by virtue of his freehold interest, had the legal right to create an estate in fee, which was good until and unless it was defeated by the remainderman, and this estate was inconsistent with the exercise of the power, which therefore became extinct, just as a power appendant was extinguished by a conveyance of the fee. But the donee of a power simply collateral, having no freehold interest, could not grant an estate. Therefore the donee of a power in gross could extinguish it by a fine, while the donee of a power simply collateral could not.

But in 1823 the case of Horner *v.* Swann [24] came before Sir Thomas Plumer, M. R. Here there was a devise in trust for the testator's widow for life, should she so long continue his widow, with a power of appointment by will to such or all of his children and their issue as she might choose. The gift in default of appointment was in trust for all the testator's children in fee, share and share alike, but if a child died under twenty-one, without leaving issue, then, as to the share of such child, for the survivors or survivor. The wife and children contracted to sell the land, and on a bill by them for specific performance, the purchaser submitted that a good title could not be made, by reason of the widow's power to appoint to the issue of the children. The court decreed specific performance.

The joining of the wife in the conveyance was really an appointment to the children, who were among the objects of the exclusive power; even if in form a release, it had the effect of an appointment to them of the shares given them in default of appointment.

The real objection to the decision was that, whether the widow's action was considered as an appointment or a release, it was an attempt to do *inter vivos* what could be done only by will. This objection will be considered later.

The opinion in Horner *v.* Swann is very unsatisfactory. It is

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[23] 5 Mad. 371, 374.

[24] T. & R. 430.

two and a half lines long: "the Vice-Chancellor has given a solemn opinion upon the point, and his decision has been acquiesced in. I shall therefore follow it." But the solemn opinion of the Vice-Chancellor was that a special power in gross was extinguished by a fine, not that it was extinguished by a release. And the reason for the donee's fine extinguishing a power did not apply to a release.

But Horner *v.* Swann seems to have been accepted by the English judges and text-writers as establishing a general doctrine that a special power in gross can be released by the donee.[25] But this has not been done without protest. Lord Redesdale, in the House of Lords, before the decision of West *v.* Berney, had asked "How can a man having a power for the benefit of children destroy it?" [26] Sir R. T. Kindersley, V. C., in Coffin *v.* Cooper,[27] said:

"In the absence of authority I should have decided this case with reference to certain broad principles, the soundness of which cannot (I think) be disputed. One is that a power to appoint among children is a power in the nature of a trust, created and intended to be exercised with a view to the benefit of the objects of the power as a class and as individuals. . . . Another general principle appears to me to be that where a donee of a power is shown to have exercised it with the view of benefiting some person not an object of the power, and, *a fortiori* with a view to his own benefit, even in the absence of any actual bargain, the appointment cannot be supported, as being in violation of the principle that nothing shall be regarded but the benefit of the objects of the power. These appear to me to be sound general principles, and if I were not concluded by authority, I should have decided the case in accordance with them. But these principles have been broken in upon little by little, until they seem to have been in a great degree set aside";

and the Vice-Chancellor felt himself bound to decide against his own opinion.

And in Palmer *v.* Locke [28] Sir George Jessell, M. R., says of Coffin *v.* Cooper, that it

"lays down what appears to me the true principle which should govern Courts of Equity in cases of this kind so clearly and forcibly that I

[25] Cunninghame *v.* Thurlow, 1 Russ. & M. 436, note; Sugden, Powers, 8 ed., 88 *et seq.*; Farwell, Powers, 2 ed., 15 *et seq.*

[26] Jesson *v.* Wright, 2 Bligh 1, 15 (1820).

[27] 2 Dr. & Sm. 365, 373 *et seq.* (1865).

[28] 15 Ch. D. 294 (1880).

think I should only diminish instead of adding to the weight of that judgment by any observations of my own. But in that case, even in the then state of the authorities, the Vice-Chancellor thought he was compelled to decide against his own opinion of what the true principle was,"

and the Master of the Rolls proceeded to follow the Vice-Chancellor.

So Farwell, J., in *In re* Ross said:[29]

"It has been held by a series of decisions — although originally, as Kindersley, V. C., points out in Coffin *v.* Cooper, somewhat contrary to principle — that the donee of a limited power of appointment may release it."

And, often, where courts have sustained the validity of the release of powers in gross, they have done so on the ground that the rule had been long established, and not on the ground that it embodied a sound principle.

And a case which shows the attitude of the courts towards this rule as to release of special powers in gross is *In re* Little.[30] The English Conveyancing and Law of Property Act,[31] gives the court a discretionary power to dispense with a clause restraining anticipation attached to the life estate of a married woman. A fund was settled on a married woman for life with a clause against anticipation. She had an exclusive power to appoint by deed or will to her children or their issue born in her lifetime. She agreed with one of her sons that his share in part of the fund should be applied for her benefit. With a view to this she released her power and applied to the court to have the son's share, together with her life interest therein, applied according to the agreement. Kay, J., refused to exercise his power to dispense with the restraint on anticipation, and this was sustained by the Court of Appeal.

The only passage which has been observed in the English reports as showing that the rule as to the release of special powers in gross can be supported on any other ground than that of authority is contained in some remarks of Chitty, J., in *In re* Somes,[32] where, after deciding that the authorities had held that such a release was valid, he goes on thus:

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[29] [1904] 2 Ch. 348, 352.
[30] 40 Ch. D. 418 (1889).
[31] 44 & 45 Vict. (1881) § 39.
[32] [1896] 1 Ch. 250, 255.

"If it be necessary to base my decision upon broader grounds, I may say that it appears to me that there is a fallacy in applying to a release of a power of this kind the doctrine applicable to the fraudulent exercise of such a power. There is no duty imposed on the donee of a limited power to make an appointment; there is no fiduciary relationship between him and the objects of the power beyond this, that if he does exercise the power of appointment, he must exercise it honestly for the benefit of an object or the objects of the power, and not corruptly for his own personal benefit; but I cannot see any ground for applying that doctrine to the case of a release of a power; the donee of the power may, or he may not, be acting in his own interest, but he is at liberty, in my opinion, to say that he will never make any appointment under the power, and to execute a release of it."

But what is the object in creating a power, especially an exclusive power, to appoint among children or issue, and making a gift in default of appointment, instead of making a gift, without any power of appointment? It is because the creator of the power deems it important that there should exist a power to make the shares unequal or to give to issue other than children, as the circumstances of the family from time to time may demand. This is the very purpose and *raison d'être* of the power, and though the power be not strictly a trust, this power of unequal appointment, or of appointment to issue instead of children, is something of which he did not intend that the donee of the power should divest himself. The matter is well put by Kay, J., in *In re* Little:[33]

"But just consider what this power really means. The power to distribute the fund among the children of the tenant for life is a power which contemplates that the circumstances of the family may so alter, that it may be of the highest possible importance to give a larger share to one child than to another. It is a power essentially, in that respect, in the nature of a trust. For instance, it is possible that one child may come into property which may make him independent, while the other children may have nothing to depend upon but this fund. Then it would be an obvious use of a power like this to give a larger share to the children who had no other means. Or, again, on the occasion of a marriage or of the advancement of a child, it might become essential to give an immediate share or a larger share to that child. All these are purposes which the donor of such a power as this must be considered to have had in his mind when he created the power."

[33] 40 Ch. D. 418, 422.

The true doctrine, therefore, as to special powers in gross, exercisable by either deed or will, it is submitted, is this:

If the person to whom an exclusive power is released is an object of the power the release is good, because it is in truth an appointment; but just as an appointment made to benefit the donee is a fraud on the power, so a release to an object of the power made to benefit the donee is a fraud on the power.[34]

If the person to whom the power is released is not an object of the power, as when a life tenant has a power to appoint to his children, but the gift in default of appointment is to B, and a release is made to B, then in a jurisdiction which is not bound by English statute or precedent, such release should be considered invalid.

To pass to powers in gross which can be executed only by will:

(B) *Can testamentary powers in gross be released?*

It is perfectly settled that a power to appoint by will cannot be exercised by deed, and that the exercise of a testamentary power by deed will not be aided in equity as a defective execution of the power.[35]

It would seem to be pretty clear on principle, that if a donee's power to appoint by will is to remain ambulatory, he cannot debar himself from changing his mind not to exercise it; but in 1822, Sir Thomas Plumer, M. R., held that a life tenant, with a general power to appoint by will, could release the power, in Barton *v.* Briscoe;[36] and in the next year he made the like decision where the power was special, in Horner *v.* Swann;[37] and the same decision was made in the case of *In re* Chambers;[38] and, under a general power, in Page *v.* Soper;[39] and in Davies *v.* Huguenin,[40] A, tenant for life, who had an exclusive special power to appoint by will to his children, with a gift over, in default of appointment, to the children, covenanted, on the marriage of his daughter, that he would not so exercise the power as to diminish her share. Wood,

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[34] Thomson's Executors *v.* Norris, 20 N. J. Eq. 489 (1869).

[35] Reid *v.* Shergold, 10 Ves. 370, 380; Sugden, Powers, 8 ed., 560; Farwell, Powers, 2 ed., 332.

[36] Jac. 603, 607.

[37] T. & R. 430.

[38] 11 Ir. Eq. 518 (1847).

[39] 11 Hare, 321 (1853).

[40] 2 Hem. & M. 730 (1863).

V. C., held, that the power was released *pro tanto*. He said: "It is almost too clear for argument (though the point was raised) that the covenant by the father operated *pro tanto* as a release of his power."

In Coffin *v.* Cooper,[41] A, having the life interest in a trust fund of personalty, had a power to appoint by will to her children, and there was a gift in default of appointment to the children. A covenanted to appoint a certain share to a son, and she appointed accordingly. It was contended that this was a fraud on the power as an attempt to exercise by deed a power which the creator of the power intended should be exercised by will only. Kindersley, V. C., felt himself bound by the authorities to hold that the appointment was good, but he thought the decision was against "certain broad principles." This was a case of an appointment, but that the learned Vice-Chancellor thought that the same principles applied to a release is shown by the words here printed in italics in his opinion, which is given in full in a note.[42]

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[41] 2 Dr. & Sm. 365 (1865).

[42] "Whatever opinion I might entertain with respect to this case, if it were not affected by authorities, I do not think I should be justified in the face of the authorities which have been cited, in coming to the conclusion that this appointment is invalid, and I must therefore look at the case having reference to those authorities.

"In this case power is given to Mrs. Comfort to appoint a fund among her children in such shares as she should by will appoint, and in default of appointment among those children equally on their attaining twenty-one, or marriage. Of course, if she appointed by will, she could only appoint among those who survived her, but if she did not appoint, then under the terms of the settlement not only those who survived her, but also those who died in her lifetime, having attained twenty-one or married, would participate. The power is to appoint by will only.

"In the absence of authority, I should have decided this case with reference to certain broad principles, the soundness of which cannot (I think) be disputed. One is, that a power to appoint among children is a power in the nature of a trust, created and intended to be exercised with a view to the benefit of the objects of the power, as a class, and as individuals.

"The donor abstained from himself fixing irrevocably the shares in which the children should take, and gave the donee power to appoint other than equal shares, because he considered that circumstances might thereafter arise to render it desirable and expedient that they should take different shares; as, for instance, one child might subsequently become very wealthy and another very poor; one child might become bankrupt or insolvent, so that anything given to him would not go to his benefit, but only to that of his creditors. The end and purpose of the power is the benefit of the children; and it appears to me to be a principle that the donee in the exercise of the power should have that object alone in view. Of course, I do not exclude the con-

In Thacker *v.* Key [43] there is an important *dictum* of James, V. C. Here there had been a covenant by the donee of a testamentary

sideration that the donor may also have intended to keep the children under the parents' control, where a parent is the donee of the power.

"Another general principle is this, that where a donor gives the power to appoint among children by will only, the power cannot be exercised by deed; and I should have thought that it would have followed as a corollary from that proposition that the donee of the power could have no right at his own will and pleasure to turn it into a power to appoint by deed. The donor intimating the power to be exercised by will only, does it designedly; his object being that, as the circumstances of the children respectively may from time to time change, and as he wishes the power to be exercised with a view to those altered circumstances, an irrevocable exercise of the power may be suspended as long as possible, till the time arrives when the fund is to come into the possession of the donees. And I think that anything which militates against that principle is contrary to the object and intention of the donor. If he had intended that the power was to be exercised by a deed *inter vivos* he might have given the power accordingly. By making it exercisable by will only, he has clearly signified his intention that it should only be exercised in that way.

"Another general principle appears to me to be that where a donee of a power is shewn to have exercised it with a view of benefiting some person not an object of the power, and *a fortiori* with a view of his own benefit, even in the absence of any actual bargain, the appointment cannot be supported, as being in violation of the principle that nothing shall be regarded but the benefit of the objects of the power.

"These appear to me to be sound general principles, and if I were not concluded by authority, I should have decided the case in accordance with them. But these principles have been broken in upon little by little, until they seem to have been in a great degree set aside.

"*First, it was decided that the donee of such a power may release it; in other words, may bind himself not to exercise the power at all, so that any subsequent exercise of the power will be void, whatever circumstances may arise, to make it desirable, with a view to the benefit of the children, that the power should be exercised. It is quite clear that a release of the power is in effect fixing the shares which the objects of the power are to take. It was next decided that the donee of a power to appoint by will among children may covenant that one of the children shall not have less than a certain amount. It seems to follow from this that the donee may covenant that the child shall have a certain share. The effect of these decisions is, to trench upon the principle that the discretion of a donee of a power to appoint among children by will, shall remain unfettered, and capable of being exercised as long as he lives. But not only has it been decided that an appointment made in pursuance of such a covenant is valid, but it has been held that such a covenant so entirely precludes any testamentary appointment inconsistent with it, that the covenantee may compel the other appointees to make it good out of the shares which the donee of the power has appointed to them by will, Davies* v. *Huguenin, 1 Hem. & M. 730. I do not presume to say that that is a wrong decision; indeed, it seems to me, that it is the legitimate result of the first innovation. But its effect is literally this, that the donee of a power to appoint among children by will only, can by deed fix the shares which the children shall take; in other words, he may convert a power to appoint by will only into a power to appoint by deed. I confess these decisions strike me as being a violation of general principles.* But

[43] L. R. 8 Eq. 408 (1869).

special power in gross to appoint a part of the fund to one of the objects of the power. The case was decided on another ground, but the learned Vice-Chancellor said:

"Now, if it had been necessary to determine that point, I think I should have had very little difficulty in holding such a covenant to be illegal and void. The testator is the donee of a testamentary power, which was to be exercised by him as a trustee. It was a fiduciary power in him to be exercised by his will, and by his will only; so that, up to

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I cannot, in the face of them, decide that the appointment in the present case is bad by reason of the covenant which had been entered into by Mrs. Comfort, there being no corrupt motive which induced her to enter into it. The object was, to benefit the son by giving security for goods to be supplied to him, and for this purpose the power of appointment over the trust fund was called in aid. There was no *mala fides* in the transaction, all was done fairly and openly; there was no intention that the mother should derive any benefit from the transaction; on the contrary, she was undertaking some sort of burden, by giving the covenant.

"There is another point for consideration. Mrs. Comfort had, by entering into the covenant, placed herself in a situation that it would be for her advantage, that is, for the benefit of her estate after her death, that she should exercise the power in accordance with the covenant, for, if she did not, her executors might be liable to an action for breach of the covenant, whereas, if she exercised it in pursuance of the covenant, she would thereby relieve her estate from liability under the covenant. And with that view she directs by her will that her son, in whose favor she makes the appointment, shall, as soon as possible after her decease, pay to Messrs. Clagett & Brachi, the same sums which by the two deeds of 1857 and 1859 she had covenanted to appoint to the son, which direction it is contended was in effect a condition annexed to the appointment, and a condition for her own benefit. And on that ground it is contended that the appointment is invalid.

"I should have been disposed to think, on abstract principle, that there was much weight in this objection. But I consider that the decisions to which I have referred are an answer to it. When once it is decided that the donee of such a power may enter into such a covenant, that goes a long way towards the conclusion that the validity of the appointment is not affected by the fact that the donee has thereby a direct personal interest in making the appointment; and the direction to the son to make the payment to Messrs. Clagett & Brachi, even if it be regarded as a condition annexed to the appointment, may be void without affecting the validity of the appointment. And further, there is the case of Stuart *v.* Lord Castlestuart, before the Master of the Rolls in Ireland, which bears distinctly upon this point. In that case, a parent having such a power as this, had become guarantee for a son, one of the objects of the power, and the appointment was made in order to enable the son to pay the debt, and it was held that that did not vitiate the appointment; that decision is referred to by Lord St. Leonards in his Treatise on Powers without disapprobation.

"For the reasons I have stated, and in the face of the decisions referred to, I cannot take upon myself to decide that this appointment is bad by reason either of the donee of the power having entered into the covenant, or of the interest which she had to induce her to exercise it as she has done. I must therefore hold the appointment to be good."

the last moment of his life, he was to have the power of dealing with the fund as he should think it his duty to deal with it, having regard to the then wants, position, merit, and necessities of his children." [44]

"If, then, Sir John Key was to have his power as a trustee up to the last moment of his life, and to exercise it only as part of a solemn act — his last will and testament; if he was to do that, I do not see how it can be considered right or proper that he should fetter that fiduciary discretion by a covenant executed by him in his lifetime. It is not, however, necessary that I should determine that point." [45]

In Isaac *v.* Hughes [46] it was again *held* that the donee of a testamentary general power could release it by deed.

In Palmer *v.* Locke,[47] A, who had a life interest in a trust fund of personalty, was given a special power to appoint by will only. A made a will by which he appointed £5000 out of the fund to his son J, and the rest to his other sons. Shortly after he executed a bond binding himself that J should receive either out of A's own property or out of the trust fund at least £5000. A died without revoking the will. Jessel, M. R., felt bound by the authorities, against his own opinion, to decide that the appointment was good. He said:

"I decide this case simply on authority; and the most singular part of it is that I concur so much in the reasoning of the decision in Coffin *v.* Cooper, which I am bound to follow, that it makes it, if I may say so, more obligatory on me to follow that authority, because that case, which was decided in the year 1865 by Vice-Chancellor Kindersley, lays down what appears to me the true principle which should govern Courts of Equity in cases of this kind so clearly and forcibly that I think I should only diminish instead of adding to the weight of that judgment by any observations of my own. But in that case, even in the then state of the authorities, the Vice-Chancellor thought he was compelled to decide against his own opinion of what the true principle was; and he actually decided that a covenant by a lady to make an appointment in favour of her son for the very purpose of enabling him to borrow money, although the appointment was to be testamentary, was a valid covenant which would render her estate liable in damages, and that if she made the appointment in pursuance of the covenant, so as to exonerate her estate from that liability to damages, the appointment was

[44] At p. 414.
[45] At p. 415.
[46] L. R. 9 Eq. 191 (1870).
[47] 15 Ch. D. 294 (1880).

a valid appointment. Now there is no possible distinction worth considering between the present case and the case of Coffin *v.* Cooper."

The case went to the Court of Appeals. There James, L. J., said:

"I am of opinion that the decision of the Master of the Rolls must be affirmed. He found himself bound by the decisions of Vice-Chancellor Kindersley in Coffin *v.* Cooper, and Vice-Chancellor Kindersley was rightly bound by what he considered to be, and what I consider to be, the common course of decision, which really prevented this point from being successfully raised."

Brett, L. J., said:

"I should have thought it very dangerous, unless there were some principle very clearly outraged, to overrule the decision of Coffin *v.* Cooper, which was decided so long ago, and which has probably been acted on; but I confess that it seems to me that, according to principle, the case of Coffin *v.* Cooper was right. . . . I agree entirely with the view which was taken by Lord Justice James in Thacker *v.* Key, that such a covenant as is here in question, and as was in question in Coffin *v.* Cooper, is a wholly void covenant."

Cotton, L. J., said:

"I do not go so far as to give an opinion that the bond is absolutely bad. . . . In one sense it is clearly bad, namely, that it cannot be construed as an exercise of a power of appointment, nor is it one that a Court of Equity would specifically perform. . . . I must add one word more to explain why I hesitate to say that such a bond as this is entirely void. It has been held that under certain circumstances such a bond, or one very like it, can be held to be a release of the power. If it is bad, it must be bad *in toto*, and I am not satisfied that it can be good as a release of a power and yet bad altogether as a covenant."

This difficulty felt by Cotton, L. J., that a covenant cannot be good for the appointment under a power, and yet can be good as a release, is a very real one.

In the case of *In re* Lawley,[48] A, the donee of a general testamentary power over a fund, borrowed money, and as security

[48] [1902] 2 Ch. 673; S. C., [1902] 2 Ch. (C. A.) 799; *sub nom.* Beyfus *v.* Lawley, [1903] A. C. 411.

covenanted with the lender that the loan should be a first charge on the fund, and that he would not revoke the will. He made a will accordingly and died. It was *held*, by Joyce, J., that the fund was assets for the payment of A's debts, and that the lender was not entitled to priority over the general creditors of the estate. The learned judge said:

"If the applicants were to succeed in the present case, the result would practically be that a donee of a general power to appoint by will could always make an effectual appointment by an instrument *inter vivos*."

The decision was affirmed by the Court of Appeals and in the House of Lords.

In the case of *In re* Evered,[49] A had an exclusive testamentary power over a fund of which she had the income for life to appoint to her children or their issue; the gift in default of appointment was to the children equally. She appointed by will £60,000 to be held in trust, the income of one sixth part to be paid to each of her six sons for life, the principal of such part to go to his children, and the residue of the fund to be held on a like trust for her six sons and her daughter. Subsequently she covenanted with three of her sons that she would not exercise her power in such a way as to reduce their respective shares in the fund below £7000 apiece, to come to them immediately on her death. The fund turned out to be about £54,000.

The Court of Appeals *held* that under the Conveyancing Act[50] she could release her testamentary power; that the covenants with the three sons operated as a release of the power, so far that she was debarred from exercising the power so far as was necessary to give effect to the covenants; that as the sons took only life interests under the appointment, the only way to give effect to the covenants was to leave £49,000 unappointed; that, therefore, only £5000 passed under the appointment; and that to give the covenants any further effect would amount to allowing testamentary powers to be exercised by deed, which cannot be done.

The above case arose under a statute, and the facts are rather complicated, but let us see how the doctrine, apart from statute,

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[49] [1910] 2 Ch. (C. A.) 147.

[50] 1881, c. 41, § 52.

as to release of a testamentary power would apply in a simple and very probable case, which may serve as a type.

A testator devises a fund of $30,000 in trust for his wife for life, with a testamentary power to appoint to or for the benefit of his children and grandchildren, on such terms and for such estates as she sees fit; the remainder in default of appointment is to the children. There are a son and two daughters. The widow makes a will by which she appoints one third of the fund to each of the children for life, with remainders to its issue. The son wishes to raise money on his share; the simplest way would be to appoint his share to the son by deed, but this it is conceded cannot be done, because the power must be exercised by will, and an appointment by will to him will not do, because the son cannot raise money on an ambulatory appointment which may be revoked. The widow therefore covenants that the son shall have on her death $10,000 out of the fund. The effect of this, on the English doctrine, is that the whole appointment fails, and the daughters have their shares outright, and yet the mother knows that the daughters, though excellent women, are, as is the case with so many excellent women, perfectly incompetent to care for money, and that it is sure to be wasted.

Or, again, a testator gives to his wife an exclusive power by will to appoint to children, and says that he makes the power exclusive, so that a child who turns out in her life to be undeserving may not share, and this, though not expressed, is often in his mind. Now the wife makes such a covenant as is suggested. The child on whose behalf the covenant is made becomes drunken, worthless, criminal, — the mother's hands are tied, although it was the purpose of the will that she should be free to do what she thought right during her whole life.

To sum up: In England, it has been settled that a covenant to exercise a testamentary power in gross cannot avail, even in equity, as an exercise of the power; but that, even apart from statute, a testamentary power in gross can be released by a covenant or other act *inter vivos*.

In most of this series of cases that we have been considering the testamentary power was special, but in some of them it was general.[51]

[51] Barton *v.* Briscoe, Jac. 603; Page *v.* Soper, 11 Hare, 321; Isaac *v.* Hughes, L. R. 9 Eq. 191; *In re* Lawley, [1902] 2 Ch. 673; [1902] 2 Ch. (C. A.) 799; *sub nom.* Beyfus *v.* Lawley, [1903] A. C. 411.

As the English cases hold on authority that a special testamentary power can be released, they must hold that a general testamentary power can also be released, but the criticisms that have been passed on the doctrine seem to apply to general equally with special powers. If the creator of a power intends that it shall be ambulatory, as he shows that he does by making it testamentary, it would seem to be immaterial whether the power is confined to particular objects or not. If the creator of the testamentary power declares that it shall be exercisable by will only, he intends that the donee shall be free to change his mind as circumstances shall require, so long as he lives.

It is submitted that Kindersley, V. C., and Jessel, M. R., are right in thinking that the decisions as to releases rest only upon authority, and are in violation of unquestionable broad doctrines of equity, and that the distinction between *exercising* a testamentary power by deed, and *releasing* such a power by deed, is, on principle, untenable.

The cases in the United States are not numerous:

Hume v. *Hord:* [52] A general power of appointment by deed or will can be released.

Brown v. *Renshaw:* [53] When the donee of a general testamentary power has the equitable fee, a conveyance of the land by him extinguishes the power.

McFall v. *Kirkpatrick:* [54] Here precisely the same question was decided as in Brown *v.* Renshaw, and in the same way.

Leggett v. *Doremus:* [55] A power is not extinguished by a judgment against the donee.

Reid v. *Gordon:* [56] If a life tenant has a power exercisable either by deed or will, such power is not extinguished as to the remaindermen by a conveyance by the donee which passes only her life estate.

Thomson's Executors v. *Norris:* [57] The New Jersey Court of Errors and Appeals determined that the release of a testamentary power given to A, a life tenant, to appoint to a class with a gift in default of appointment to certain members of the class, if made for

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[52] 5 Grat. (Va.) 374 (1849).
[53] 57 Md. 67 (1881).
[54] 286 Ill. 281 (1908).
[55] 25 N. J. Eq. 122 (1874).
[56] 35 Md. 174 (1871).
[57] 20 N. J. Eq. 489 (1869).

the benefit of A, was void as a fraud on the power. Beasley, C. J., in delivering the opinion raises the question whether, "when an interest, for life or for years," is given to A, with direction to appoint by will or otherwise, between B and C, who are strangers to A, "such a power can be released." He says: "I shall pass the question without the expression of any opinion upon it." But it is evident that the learned Chief Justice's opinion inclined against the validity of the release.

Atkinson v. *Dowling:*[58] A, a life tenant, had an exclusive testamentary special power of appointment, with a gift, in default of appointment, to her three sons. *The sons conveyed their remainder to A,*[59] and she then conveyed the land. It was held that the power was extinguished. By the conveyance of the sons, A became tenant in fee, and the power became appendant.

All these decisions seem in accordance both with principle and precedent.

Thorington v. *Thorington:*[60] A, tenant for life, had a testamentary power to appoint to her three sons, B, C, and D, "on such shares and proportions to them, or the survivors, and under such safeguards, in trust or otherwise, as, under the circumstances then existing, she may deem just and wise"; the remainder in default of appointment was to the sons or their survivors. B died leaving children. A, C, and D, and the children of B, by their guardian, filed a bill in equity praying that the land might be sold. A guardian *ad litem* was appointed for the children of B, and the court ordered a sale.

The court having held that it had jurisdiction to decree the sale of infants' lands, proceeded to discuss whether a testamentary special power could be released, and, basing itself on Smith *v.* Death and Horner *v.* Swann, was of opinion that the release would be valid.

It should be observed that the only objects of the power were the remaindermen.

Grosvenor v. *Bowen:*[61] A, tenant for life, had a general testamentary power; there was a gift over in default of appointment. The Supreme Court of Rhode Island *held*, following Smith *v.* Death and Horner *v.* Swann, that the power was released or

[58] 33 S. C. 414 (1890).
[59] See pp. 415, 425.
[60] 82 Ala. 489 (1886).
[61] 15 R. I. 549 (1887).

extinguished, and that A and the remaindermen could pass a good title.

These three preceding cases suggest this query: If we assume that a testamentary power in gross cannot be released, why is it not always possible to evade this by the remaindermen conveying their interest to the life tenant; the power thus becoming a power appendant, the tenant can convey the land, and agree to hold the proceeds for the remaindermen, or settle it on himself for life with remainder to them. It is conceived that if the conveyance by the remaindermen to the life tenant is made *bonâ fide*, with the intention that the tenant for life shall become the real owner in fee, there is no reason why the power cannot be extinguished as appendant; but that if the conveyance is made to him only for the purpose of enabling him to extinguish the power (and the subsequent transactions would show whether this was the case), it is conceived that the acceptance of the conveyance by him might well be regarded as a fraud on the power.

Columbia Trust Co. v. *Christopher:*[62] Land was devised to trustees to pay the income to A for life, and on her death to B for life and on B's death to convey to certain charities. B had a power, not testamentary, to appoint to another charity to be established by her. The Court of Appeals of Kentucky *held*, following the English precedents, that B could release the power.

It should be observed that in Grosvenor *v.* Bowen the power was general, and that in Columbia Trust Co. *v.* Christopher it was not testamentary.

There are therefore only two states, Kentucky and Rhode Island, in which the English precedents have been followed (with perhaps the addition of Alabama), and it is submitted that the "broad principles of equity," to use the expression of Kindersley, V. C., require that the doctrine should not be adopted in other jurisdictions.

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[62] 133 Ky. 335 (1909).

EXECUTORY ULTRA VIRES TRANSACTIONS.

CERTAIN associates were incorporated, pursuant to the provisions of a general law, under the name of the X Transportation Company. A condition precedent to incorporation was that a certificate of incorporation should be filed in a certain public office, and that this certificate should contain a statement of "the purpose for which the corporation is formed." The certificate so filed stated that the purpose was "to engage in the business of transporting persons by means of hacks or other vehicles."

Thereafter the incorporated associates voted also to engage in the business of transporting goods by express. In the name of X, and by the use of the funds of X, they purchased the necessary equipment, employed the necessary servants, and, by advertisements and otherwise, stated to the public that X was engaged in the express business. For some years they carried on an extensive express business in the name of X, and the net profits were distributed to the associates as shareholders of X.

M delivered goods to be carried by express to one of the servants so employed, and the servant gave to M a receipt which stated that X undertook to deliver the goods. The charges, amounting to $1.00, were prepaid. The goods were not delivered. M now sues X to recover $100, and the facts are such that, if X had been authorized to engage in the express business, M could recover such sum from X.

X defends on the ground that making the contract in question was beyond its powers, and that therefore it can be held to no liability for the breach of such contract. Ought this defense to prevail?

Conceivably a corporation could be formed, if there were the necessary legislative sanction, with authority to do all acts which a human being might lawfully do. But American legislatures in granting the corporate privilege, either by special charter or pursuant to the provisions of a general law, always have been, and still are, accustomed to incorporate any given body of associates

for some, and not for all, purposes. The authorized scope of corporate action by the associates is defined.

When the associates assume to act in the name of the corporation outside the authorized scope of their corporate action, some judges have felt that they *could* not hold the corporation liable for such acts. They reason that a corporation *can*, in the nature of things, act only within the limits set by the state; and they conclude that the only question which, in the nature of things, they can consider is whether the natural persons who assumed to do the act in the name of the corporation are to be held liable.

To this reasoning there are two answers.

(1) Conceding that a corporation is invisible and intangible, and that it has its being only in the imagination of the law, the law nevertheless recognizes that the corporation is responsible for some visible, tangible acts. Otherwise, corporation law would be mere legal ghost-lore. Human beings act, and responsibility for some of their acts is certainly cast upon the corporation. Responsibility for any act of a human being *may* conceivably be cast upon the corporation. *Respondeat Corporation.* A legal unit may be held responsible for the act of another unit, even though the legal unit did not have the power to do the act in question. A man without arms may be responsible for the note which his agent has signed.

(2) Unauthorized corporate action is no more a fiction than is authorized corporate action. If the associates assume to act in the name of the corporation beyond the authorized scope of their corporate action, there is unauthorized corporate action. The charter, or other legislative sanction, does not make possible what is otherwise, in the nature of things, impossible; it makes authorized what is otherwise unauthorized. It is for the state to grant the authority to associates to act as a corporation, — as a one. If the state itself does not object to certain unauthorized corporate action, the courts should consider whether they will allow a private individual to show collaterally the lack of authority.[1] All courts have given a wide scope to the doctrine that collateral attack upon unauthorized corporate action may be denied, under some circumstances.[2]

[1] For a fuller statement of this reasoning, see 23 HARV. L. REV. 495.

[2] See the authorities cited in the notes to the articles in 20 HARV. L. REV. 456; 21 HARV. L. REV. 305; 23 HARV. L. REV. 495.

We turn, then, to the consideration of the question, not whether the defense of *ultra vires* must be allowed, owing to the nature of things, but whether such defense ought to be allowed.

Incorporated associates engage in a business in which they are not authorized to engage; they procure an outsider, M, to contract with them as a corporation with respect to such business; then, when M sues them as a corporation, they defend on the ground that they were not authorized to make the contract as a corporation. They seek to take advantage of their own wrong.

The case put at the opening is sharply to be distinguished from a case where all of the incorporated associates have not consented that the funds of the corporation should be employed in a venture outside the scope of corporate action, as defined in the certificate of incorporation. Under modern conditions, the authorized scope of action by any particular corporation is limited, partly because the state for reasons of public policy wishes to confine the corporate action within defined limits, but chiefly because it is for the advantage and protection of the associates that they should know for what purposes the funds of the corporation are to be used. If an associate contributes funds to be used in one venture, he has the right to insist that they shall be used in no other. If the officers or directors propose to use the funds or credit of the corporation in some other venture, it is entirely clear that any one of the incorporated associates may restrain them, — and that, even though an overwhelming majority of the associates approve the proposed action. If the officers or directors have assumed, in the name of the corporation, but without the consent of all the incorporated associates, to make with M a contract which is outside the scope of corporate action, as defined in the certificate of incorporation, he ought not to be entitled to hold the corporation for a breach of the contract any more than any outsider is entitled to hold a principal for the breach of a contract which an agent has assumed to make in the name of the principal, if the making of such contract was beyond the scope of the agent's authority.[3]

[3] A principal must respond for the contract of his agent made without authority but with apparent authority; similarly if a corporation has authority to do a certain act under some circumstances, and it appoints an agent with authority to do such act under such circumstances, and the agent does the act under other circumstances, responsibility for the act will be cast upon the corporation in favor of an outsider who did not know that the act was unauthorized. Monument Nat'l Bank *v.* Globe

If, however, all the incorporated associates have consented that the funds of the corporation should be employed in a venture outside the scope of corporate action, as defined in the certificate of incorporation, and a contract has been made in the course of such venture in the name of the corporation, the corporation cannot be allowed to escape liability on such contract, for the sake of affording protection to the incorporated associates.[4]

Two other reasons for allowing the corporation to escape have been advanced.

(1) The first reason advanced is that all unauthorized corporate action is illegal, — an encroachment upon the state's prerogative; that the scope of authorized corporate action by any particular corporation can be determined by examining its certificate of incorporation (which is a matter of public record), together with the general laws and constitution of the state; that persons dealing with corporations are therefore to be charged with knowledge of the scope of authorized corporate action; and that if M makes a contract with the corporation outside of such scope he has voluntarily participated in an illegal transaction. The corporation is permitted to plead *ultra vires*, not because the corporation ought to escape liability, but because no relief ought to be given to M.

Injustice between the parties ought not to be done, unless the

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Works, 101 Mass. 57; Credit Co. *v.* Howe Machine Co., 54 Conn. 357; Bissell *v.* Michigan Southern Companies, 22 N. Y. 258, 289, 304; National Bank *v.* Young, 41 N. J. Eq. 531; Stouffer *v.* Smith-Davis Co., 154 Ala. 301; Jacobs Co. *v.* Southern Co., 97 Ga. 573; Lucas *v.* White Line Transfer Co., 70 Ia. 541, 546; Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543; Colorado Co. *v.* American Co., 97 Fed. 843; Norwich *v.* Norfolk Co., 4 E. & B. 397, 443; David Payne & Co., [1904] 2 Ch. 608.

[4] The consent of the shareholders need not be expressed by any formal vote of authorization or ratification. Where the funds of the corporation are openly employed in a venture outside the contemplated scope of corporate action, so that the fact could upon inquiry be ascertained, if the shareholder does not restrain the further prosecution of the venture within a reasonable time, it is proper for the law to impose upon him a ratification of such employment. If shareholders are to be protected, to the detriment of outsiders, against the unauthorized acts of the directors and officers, it is not improper to impose a duty upon shareholders to inquire as to the conduct of the directors and officers, and to restrain such conduct, if improper.

This view is supported by Bissell *v.* Michigan Southern Companies, 22 N. Y. 258, 267, 279; Kent *v.* Quicksilver Mining Co., 78 N. Y. 159, 184; Camden R. R. Co. *v.* Mays Landing Co., 48 N. J. L. 530, 571; Bangor *v.* State Co., 203 Pa. 6; Pannebaker *v.* Tuscarora R. R. Co., 219 Pa. 60; Western Development Co. *v.* Caplinger, 86 Ark. 287; Denver Fire Ins. Co. *v.* McClelland, 9 Colo. 11. *Cf. Re* Phoenix Assurance Co., 2 J. & H. 441.

interests of the state require it. It is quite conceivable that some unauthorized corporate action might be so objectionable to the state, — that the need of checking it might be so urgent, that the courts ought, for the sake of a general inhibitory policy, to allow the lack of authority to be shown collaterally even by the associates themselves.[5] But under modern conditions, where the corporate privilege is so freely given for most purposes, the sacrifice of M in order to prevent encroachment upon the states's prerogative ought not to be the rule, — it ought at most to be an exception to the rule to be justified by special circumstances.

Suppose associates who have attempted to incorporate, but fail to perform a condition precedent to incorporation, assume to contract as a corporation with M, and M later sues them as a corporation for breach of the contract. The general rule certainly is that the associates may not defeat this action by showing their lack of authority to act as a corporation.[6]

(2) The second reason advanced is that it is not sufficient to consider only those who were the incorporated associates at the time the contract was made, but that the court must consider two other classes: (*a*) those who may have purchased shares of stock since the contract was made, and (*b*) the creditors of the corporation; that when one buys shares of stock in a corporation, or lends money to it, he is entitled to assume that its funds are, and will be, employed only in ventures within the scope of corporate action, as defined in its certificate of incorporation; that M is to be charged with knowledge of the scope of contemplated corporate action; and that if M makes a contract with the corporation outside of such scope he has voluntarily participated in a transaction which he knows may be detrimental to future shareholders and to creditors. For their protection, therefore, the corporation must be allowed to escape liability on the contract.

It is as though M contracted with A, as agent of X; and that X should seek to defend, not on the ground that A was not authorized to make the contract, but on the ground that X owed a

[5] See Bissell *v.* Michigan Southern Companies, 22 N. Y. 258, 287; N. Y. State Loan Co. *v.* Helmer, 77 N. Y. 64; Pratt *v.* Short, 79 N. Y. 437; N. Y. Ins. Co. *v.* Ely, 5 Conn. 560; Franklin National Bank *v.* Whitehead, 149 Ind. 560; *Re* Mutual Ins. Co., 107 Ia. 143; State *v.* Savings Bank, 136 Ia. 79.

[6] See the authorities cited in the notes to the articles in 20 HARV. L. REV. 456; 21 HARV. L. REV. 305.

duty to other persons not to make such a contract, and that M knew he owed such duty.

All persons must at their peril ascertain the laws. The observance of the laws is so essential to public welfare that this rule is justified, in spite of any hardship which it from time to time imposes on particular individuals. Because certificates of incorporation are matters of public record, some courts have leaped to the conclusion that they should lay down a second rule to the effect that all persons must at their peril ascertain their contents. But the considerations of public welfare which justify the first rule are far stronger than any considerations of public welfare tending to support such a second rule. The existence of the first rule does not, without more, justify the existence of the second rule.

In East Anglian Ry. Co. *v.* Eastern Counties Co.[7] the directors of the defendant entered into a covenant to pay to the plaintiffs the expense of promoting certain bills before Parliament. The expense was incurred, and the defendant was allowed to escape paying, on the ground that such a covenant was *ultra vires*. Jervis, C. J., said [8] that the act incorporating the defendant

"is a public act, accessible to all, and supposed to be known to all; and the plaintiffs must, therefore, be presumed to have dealt with the defendants with a full knowledge of their respective rights, whatever those rights may be." [9]

In Bissell *v.* Michigan Southern R. R. Co.,[10] the directors of the defendant corporations, with the acquiescence of the shareholders, operated a railroad. The operation of this railroad was not within the contemplated scope of corporate action. A passenger upon such railroad sued the defendants for breach of their contract to carry him safely. Comstock, J., said: [11]

"A traveller from New York to the Mississippi can hardly be required to furnish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations."

The question whether a certain contract is within the contemplated scope of corporate action is usually a question which a lay-

[7] 11 C. B. 775 (1851). [8] At p. 811.

[9] See Broughton *v.* Manchester Water-Works, 3 B. & A. 1 (1819), and Fairtitle *v.* Gilbert, 2 T. R. 169 (1787). *Cf.* Doe *v.* Horne, 3 G. & D. 239 (1842).

[10] 22 N. Y. 258 (1860). [11] At p. 281.

man is not competent to determine. He needs the advice of counsel. There is a large difference between a contract by which a corporation undertakes to take a lease of a railroad, and a contract by which the corporation undertakes to carry a passenger over the line so leased. The opportunity for investigation and deliberation, and the importance of the transaction in the one case are such that a rule requiring the outsider to ascertain, at his peril, the contemplated scope of the corporation's action is not unreasonable; the nature of the transaction in the second case is such that to apply the same rule is palpably unreasonable.

Those who contract with a corporation in respect to its business are entitled to consideration as well as those who contract with a corporation in respect to its securities.

In Eastern Counties Ry. Co. *v.* Hawkes,[12] Lord St. Leonards said that his disposition was

"to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express, or implied from the nature of the corporation and of the contract entered into." [13]

It is submitted that the courts should not require persons contracting with corporations to ascertain at their peril the contemplated scope of corporate action, unless the nature of the corporation and the contract make such requirement reasonable. (The subsidiary facts being found, the ultimate question whether, on such facts, such a requirement is reasonable should be for the court to determine.)

In the case put at the opening of the article such a requirement, it is submitted, would not be reasonable. Is M, under such circumstances, to be sacrificed, not to the interests of the state, but to the interests of a shareholder, N, who may have come in since the contract was made, or to the interest of a creditor, P?

M and N are both innocent. By allowing the corporation to defend, the courts inflict the whole burden on M, and only a fraction of the benefit accrues to N (such fraction as his stock is of the whole capital stock), and the rest of the benefit accrues to those who are repudiating their own acts.

Unless the discharge of the obligation to M appreciably weakens

[12] 5 H. L. Cas. 331, 373 (1855).

[13] See also Sturdevant *v.* Bank, 62 Neb. 472.

P's security, the burden to him is merely conjectural. It is probably the law that a creditor cannot restrain a corporation from embarking its funds upon a venture outside the contemplated scope of corporate action, unless his security is endangered.[14] It is therefore extraordinary that the corporation should be allowed to escape its liability to M for the sake of protecting P.

It is accordingly submitted that, (1) if all the shareholders of X who were such at the time the contract with M was made authorized or ratified the transaction of the business in the course of which this contract was made, and (2) if M did not know and could not reasonably be charged with knowledge that the contract was outside the contemplated scope of X's action, then X should not be allowed to defend on the ground that the contract was *ultra vires*.

If any exception to this general rule ought to be made, it would be where the discharge of the obligation to M would take funds needed to pay or adequately to secure other creditors. It is submitted that there should be no exception. Suppose A, a natural person, borrowed from B, promised B to employ the funds only in a certain venture, but did employ them in another venture, and, in conducting the other venture, made a contract with M. Certainly A could not escape liability on his contract with M, for the sake of B, if M did not know, and could not reasonably be charged with knowledge, that A owed this duty to B.

It may be suggested that it does not prejudice M to lose his suit against the corporation, for he should be entitled to some remedy against the associates individually who consented to the prosecution of the *ultra vires* venture. The argument is as broad as it is long. If the future shareholders or the creditors are prejudiced through M's recovery, they should be entitled to some remedy against such associates.

If M knew or could reasonably be charged with knowledge that the contract was *ultra vires* he may, with propriety, be said to be in fault. He may be entitled to some remedy against the associates individually who consented to the prosecution of the *ultra vires* venture, and he may be entitled to quasi-contractual relief against the corporation, but he should not be entitled to relief against the corporation on the contract.

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[14] Mills *v.* Northern Ry., 5 Ch. App. 621.

If any exception to this general rule ought to be made, it would be where M affirmatively establishes that no new shareholders have come in, and that the discharge of the obligation to him would not take funds needed to pay or adequately to secure other creditors. It is submitted that there should be no exception. It is desirable that there should be some checks on unauthorized corporate action by collateral attack, if this does not produce injustice between the parties, and if it is in fact reasonable to charge M with knowledge that the contract was *ultra vires*, it is also reasonable to discourage his participating in such contracts by making a sweeping rule that he may never recover against the corporation on such contracts.

So far we have assumed that M was the plaintiff. Assume now that the corporation sues M for the breach of a contract between them, and M seeks to defend on the ground that the contract was *ultra vires* of the corporation.

If M could have enforced the contract against the corporation, there is no sufficient reason why the corporation should not enforce it against M.

If M could not have enforced the contract against the corporation, it is submitted that the corporation ought not to be allowed to enforce it against M.

The promise of the corporation, although unenforcible, is not void. When executed, it becomes the foundation of rights.[15] It resembles not a promise rendered void by coverture but a promise rendered unenforcible by illegality. M is therefore not entitled to defend on the ground that there was no consideration for his promise.

But if M was at fault, the associates were more at fault. If any one ought to be charged with knowledge of the scope of corporate action, it is the associates themselves. The associates certainly could not sue as a corporation on the contract, except on the plea of bringing advantage to those who had bought stock since the contract was made, or to those who were its creditors. If this were permitted, the unauthorized contracts of a corporation would be like the contracts of an infant. No loss, and only gain, could result to the associates from entering into them. The whole burden

[15] See 23 HARV. L. REV. 495.

of an inhibitory policy against such contracts would fall upon the outsiders. It is desirable that the associates, as well as the outsiders, should be loath to enter into such contracts.

The state of the authorities is indicated in a note.

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NOTE ON THE AUTHORITIES.

Authorities denying all relief on the contract.

There has been no adequate consideration by the courts of the question whether M, in all cases, is to be charged with knowledge that the contract in question was *ultra vires* of the corporation. There are decisions by the Supreme Court of the United States, written by Mr. Justice Gray, in which such a rule is laid down in sweeping terms, and M is denied all relief against the corporation on the contract. Central Transportation Co. *v.* Pullman's Car Co., 139 U. S. 24; McCormick *v.* Market Bank, 165 U. S. 538. See the review of the decisions in this court in 23 HARV. L. REV. 498–504.

The court treats as immaterial the question whether all the shareholders had authorized or ratified the *ultra vires* venture.

The same result is reached by the English courts. East Anglian Railways Co. *v.* Eastern Counties Railway Co., 11 C. B. 775; Gage *v.* Newmarket Ry. Co., 21 L. J. N. S. (Q. B.) 398; MacGregor *v.* Deal Ry. Co., 22 L. J. N. S. (Q. B.) 69; South Yorkshire Ry. *v.* Great Northern Ry. Co., 9 Exch. 55; Shrewsbury Ry. Co. *v.* North-Western Ry. Co., 6 H. L. Cas. 113; *Re* Phoenix Life Assurance Society, 2 J. & H. 441; Ashbury Ry. Co. *v.* Riche, L. R. 7 H. L. 653 (this remains the leading case).

There are authorities in many of the state courts which reach the same result, or, at least, give some sanction to the reasoning of Mr. Justice Gray. In many of these cases, however, the contract was made without the authority or acquiescence of all the shareholders, and the courts base their decisions partly on this fact.

Alabama: Chewacla Lime Works *v.* Dismukes, 87 Ala. 344; Steiner *v.* Steiner Co., 120 Ala. 128, 141.

Connecticut: Hood *v.* N. Y. & N. H. R. R. Co., 22 Conn. 502; Byrne *v.* Schuyler Mfg. Co., 65 Conn. 336.

Georgia: First National Bank of Tallapoosa *v.* Monroe, 69 S. E. 1123. (*Cf.* Macon Co. *v.* Georgia R. R. Co., 63 Ga. 103, 119.)

Illinois: National Home Assn. *v.* Home Bank, 181 Ill. 35; Best Brewing Co. *v.* Klassen, 185 Ill. 37. (The older cases of Ward *v.* Johnson, 95 Ill. 215, and Heim's Brewing Co. *v.* Flannery, 137 Ill. 309, are apparently no longer law.)

Maine: Franklin Co. *v.* Lewiston Bank, 68 Me. 43; Brunswick Gas Light Co. *v.* United Gas Co., 85 Me. 532.

Maryland: Western Maryland R. R. Co. *v.* Blue Ridge Co., 102 Md. 307. (*Cf.* General Home *v.* Hammerbacker, 64 Md. 595, 606; United German Bank *v.* Katz, 57 Md. 128.)

Massachusetts: Davis *v.* Old Colony R. R. Co., 131 Mass. 258; Dresser *v.* Traders' Bank, 165 Mass. 120. (*Cf.* Chester Glass Co. *v.* Dewey, 16 Mass. 94, 102; Slater Woollen Co. *v.* Lamb, 143 Mass. 420; N. Y. Bank Note Co. *v.* Kidder Press Mfg. Co., 192 Mass. 391, 404.)

Mississippi: Greenville Compress *v.* Planters' Press, 70 Miss. 669, 676. (*Cf.* Prairie Lodge *v.* Smith, 58 Miss. 301.)

New Hampshire: Downing *v.* Mount Washington Road Co., 40 N. H. 230; Norton *v.* Bank, 61 N. H. 589. (*Cf.* Abbott *v.* Bank, 68 N. H. 290.)

Ohio: Bank of Chillicothe *v.* Swayne, 8 Ohio 257; Simpson *v.* Building Assn., 38 Oh. St. 349.

Tennessee: Marble Co. *v.* Harvey, 92 Tenn. 116. (*Cf.* Tennessee Ice Co. *v.* Raine, 107 Tenn. 151.)

Vermont: Metropolitan Stock Exchange *v.* National Bank, 76 Vt. 303.

Authorities giving relief on the contract under some circumstances.

In New York, it cannot be said that the courts have expressly repudiated the rule that M, in all cases, is to be charged with knowledge that the contract in question was *ultra vires* of the corporation. But the decisions can scarcely be reconciled with the existence of such a rule. ("To hold that one dealing with a corporation must know the limit of its power to contract in all cases, upon the ground that it will be presumed to know the law, would seem to be fatal to all cases of estoppel when *ultra vires* is set up as a defense." *Per* Hooker, J., in Geraghty *v.* Washtenaw Co., 145 Mich. 635, 640.) The law seems to be that if the corporation has not received from M anything of value by reason of the performance, in whole or in part, of his side of the contract, M will be given no relief against the corporation. Jemison *v.* Citizens' Bank, 122 N. Y. 135; Appleton *v.* Citizens' Bank, 190 N. Y. 417; Gause *v.* Commonwealth Trust Co., 106 N. Y. Supp. 288. (*Cf.* Martin *v.* Niagara Falls Co., 122 N. Y. 165.) But if the corporation has received from M something of value by reason of the performance, in whole or in part, of his side of the contract, then M may have relief against the corporation on the contract itself to a corresponding extent. Comstock, C. J., in Bissell *v.* Michigan Southern Companies, 22 N. Y. 258; Parish *v.* Wheeler, 22 N. Y. 494; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62, 70; Palmer *v.* Cemetery, 122 N. Y. 429, 435; Linkhauf *v.* Lombard, 137 N. Y. 417; Hannon *v.* Siegel-Cooper Co., 167 N. Y. 244; Vought *v.* Eastern Bldg. Ass'n, 172 N. Y. 508; Milborne *v.* Royal Benefit Soc., 14 N. Y. App. Div. 406; Usher *v.* N. Y. Central R. R. Co., 76 N. Y. App. Div. 422; Curtis *v.* Natalie Coal Co., 89 N. Y. App. Div. 61.

The corporation may have similar relief against M. Whitney Arms Co. *v.* Barlow, 63 N. Y. 62; Woodruff *v.* Erie Ry. Co., 93 N. Y. 609; Rider Co. *v.* Roach, 97 N. Y. 378; Buffalo *v.* Balcom, 134 N. Y. 532; Bath Gas Light Co. *v.* Claffy, 151 N. Y. 24; Washington Life Ins. Co. *v.* Clason, 162 N. Y. 305.

There are authorities in many of the state courts which give the same, or similar, results.

Arkansas: Minneapolis Ins. Co. *v.* Norman, 74 Ark. 190; Western Development Co. *v.* Caplinger, 86 Ark. 287.

California: Bay City Ass'n *v.* Broad, 136 Cal. 525.

Colorado: Denver Fire Ins. Co. *v.* McClelland, 9 Colo. 11.

Indiana: State Board *v.* Citizens Street Ry. Co., 47 Ind. 407; Poock *v.* Lafayette Ass'n, 71 Ind. 357; Pancoast *v.* Travelers Ins. Co., 79 Ind. 172, 178; Louisville Ry. Co. *v.* Flanagan, 113 Ind. 488, 495; Wright *v.* Hughes, 119 Ind. 324; Muncie Gas Co. *v.* Muncie, 160 Ind. 97, 104. (*Cf.* Franklin Nat'l Bank *v.* Whitehead, 149 Ind. 560.)

Iowa: See the reasoning of the court in *Re* Mutual Ins. Co., 107 Ia. 143.

Kansas: Harris *v.* Gas Co., 76 Kan. 750; Electric Co. *v.* Blue Rapids Township, 77 Kan. 580.

Louisiana: Canal Co. *v.* St. Charles Co., 44 La. Ann. 1069, 1075.

Massachusetts: Chester Glass Co. *v.* Dewey, 16 Mass. 94, 102; Slater Woollen Co. *v.* Lamb, 143 Mass. 420; N. Y. Bank Note Co. *v.* Kidder Press Mfg. Co., 192 Mass. 391, 404. (*Cf.* Davis *v.* Old Colony R. R. Co., 131 Mass. 258; Dresser *v.* Traders' Bank, 165 Mass. 120.)

Michigan: Hall Mfg. Co. *v.* American Supply Co., 48 Mich. 331; Carson City Bank *v.* Elevator Co., 90 Mich. 550; Dewey *v.* Ry. Co., 91 Mich. 351; Rehberg *v.* Tontine Surety Co., 131 Mich. 135; Geraghty *v.* Washtenaw Co., 145 Mich. 635.

Minnesota: Seymour *v.* Chicago Society, 54 Minn. 147; Bell *v.* Mendenhall, 78 Minn. 57.

New Jersey: Camden R. R. Co. *v.* Mays Landing Co., 48 N. J. L. 530; Chapman *v.* Iron Clad Co., 62 N. J. L. 497; Whitehead *v.* American Lamp Co., 70 N. J. Eq. 581.

North Carolina: Trustees *v.* Realty Co., 134 N. C. 41, 49.

North Dakota: Clarke *v.* Olson, 9 N. Dak. 364.

Pennsylvania: Oil Creek Co. *v.* Penn. Transportation Co., 83 Pa. 160; Wright *v.* Pipe Line Co., 101 Pa. 204; Boyd *v.* American Carbon Block Co., 182 Pa. 206; Pittsburg R. R. Co. *v.* Altoona R. R. Co., 196 Pa. 452; Presbyterian Board *v.* Gilbee, 212 Pa. 310, 314.

Texas: Bond *v.* Terrell Co., 82 Tex. 309.

Utah: Bear River Co. *v.* Hanley, 15 Utah 506.

Wisconsin: Farwell Co. *v.* Wolf, 96 Wis. 10; McElroy *v.* Minnesota Co., 96 Wis. 317; Ledebuhr *v.* Wisconsin Trust Co., 112 Wis. 657, 662.

Where the plaintiff performs after the defendant has repudiated the contract.

If the contract is wholly executory on both sides, the authorities are nearly unanimous that no action for breach of the contract may be maintained. But see the reasoning of the court in Harris *v.* Gas Co., 76 Kan. 750.

In First Presbyterian Church *v.* State Bank, 57 N. J. L. 27, 31, a corporation contracted to pay A so much a year, so long as he refrained from erecting a certain building. After several payments had been made, the corporation notified A that it would no longer recognize the contract. A continued to refrain from erecting the building, and was allowed to recover on the contract. See also Pannebaker *v.* Tuscarora R. R. Co., 219 Pa. 60; Ledebuhr *v.* Wisconsin Trust Co., 112 Wis. 657, 662.

Where the corporation is the plaintiff.

By the distinct weight of authority, the rules regulating recovery on an *ultra vires* contract are the same whether M, or the corporation, is plaintiff. See Copper Miners *v.* Fox, 15 Jur. 703; Nassau Bank *v.* Jones, 95 N. Y. 115; Bank of Chillicothe *v.* Swayne, 8 Ohio 257; Marble Co. *v.* Harvey, 92 Tenn. 116. *Cf.* Davis *v.* Old Colony R. R. Co., 131 Mass. 258, 272.

In National Bank *v.* Matthews, 98 U. S. 621, a bank had loaned money on the security of real estate, and was allowed to enforce the security. In Central Transportation Co. *v.* Pullman's Car Co., 139 U. S. 24, a corporation made a lease, and was not allowed to recover the rent reserved. In both cases the corporation which had done the *ultra vires* act was the plaintiff. Therefore these two cases cannot be distinguished on the ground that the court has one rule when the corporation is plaintiff, and another when M is the plaintiff.

Mortgages and leases.

May the two cases just cited be distinguished on the ground that a lease is an executory transaction, and a mortgage is an executed transaction?

It is submitted that a contract is never executed until the parties have purported to do all that they promised to do. The question whether the plaintiff should be given specific performance of a promise by the defendant, or should be given damages because of non-performance cannot arise if the transaction is executed.

If all the consideration for a lease has been paid, the transaction is executed, but not otherwise. Harris *v.* Gas Co., 76 Kan. 750; Memphis Co. *v.* Grayson, 88 Ala. 572, 577. But see Pittsburgh R. R. Co. *v.* Altoona R. R. Co., 196 Pa. 452, 467; Camden R. R. Co. *v.* Mays Landing Co., 48 N. J. L. 530.

A mortgage is given as security for the performance of a promise. In substance, the transaction is therefore executory. See Bank of Gadsden *v.* Winchester, 119 Ala. 168, 171.

The real explanation of National Bank *v.* Matthews, taken in connection with Central Transportation Co. *v.* Pullman's Car Co. is that at the time the Matthews case was decided the court did not entertain the views on *ultra vires* contracts which were later expressed by Mr. Justice Gray. The reasoning of the two cases is inconsistent, and, in intellectual honesty, ought to be recognized as inconsistent.

Devises and bequests.

A word as to devises and bequests to charitable corporations of property which (owing to its amount) they are not authorized to take. Here no question of contract — of promises — is involved. There is no dispute *inter partes*, — the testator wished to give, and the corporation wishes to receive. Moreover, the rights of the investing public are in no wise involved. The only objection is that, as against the state, the taking is unauthorized. It would seem therefore that, if the state does not wish to object (and, *a fortiori*, if the state has expressly waived its right to object), there is no occasion to allow the heirs or next of kin to array themselves in opposition to the will. The danger to the public possibly arising from large aggregations of property in the hands of corporations is sufficiently guarded against by the power of direct attack by the state, — this does not need to be supplemented by collateral attack.

This view makes it immaterial to consider whether devises and bequests are executed or executory transactions. If the question were material, a devise would seem to be quite as much an executed transaction upon the death of the testator as a conveyance *inter vivos* is executed upon the delivery of the deed. In the one case the court must decide that the paper-writing is a will, but in the other case it must decide that the paper-writing is a deed. The nature of a bequest is not so clear. The legatee will usually need the aid of the court to obtain the property (and, at least, the executor will need the sanction of the court for having paid the money), and a court would probably be disinclined to regard the transaction as executed upon the death of the testator.

There seems to be no decision in which one rule has been laid down as to devises, and another as to bequests. (See, however, the opinion of Battle, J., in Davidson College *v.* Chambers, 3 Jones Eq. (N. C.) 253, 260.)

Collateral attack upon such devises and bequests was denied in Jones *v.* Habersham, 107 U. S. 174; Brigham *v.* Brigham Hospital, 134 Fed. 513, 527; White *v.* Howard, 38 Conn. 342; Eliot's Appeal, 74 Conn. 586; Hamsher *v.* Hamsher, 132 Ill. 273; Hayward *v.* Davidson, 41 Ind. 212; Farrington *v.* Putnam, 90 Me. 405;

Hanson *v.* Little Sisters of the Poor, 79 Md. 434; *In re* Stickney's Will, 85 Md. 79, 104; Hubbard *v.* Worcester Art Museum, 194 Mass. 280; Chambers *v.* St. Louis, 29 Mo. 543.

Collateral attack was permitted in Cromie *v.* Louisville Orphans' Home, 3 Bush (Ky.) 365, 383; Matter of McGraw, 111 N. Y. 66; Davidson College *v.* Chambers, 3 Jones Eq. (N. C.) 253; Wood *v.* Hammond, 16 R. I. 98, 115; House of Mercy *v.* Davidson, 90 Tex. 529.

A PROPOSED UNIFORM MARRIAGE LAW.

THE subject of uniform marriage legislation has been before the Conference of Commissioners of Uniform State Laws since 1907. At the National Congress on Uniform Divorce Laws held in 1906, a committee had submitted certain important recommendations with reference to marriage licenses; but the Congress regarded this matter as beyond its scope, and recommended its consideration to the Commissioners on Uniform State Laws.[1]

No action was taken by the Commissioners in 1907. In 1908, at Seattle, the Conference received a lengthy report from the Committee on Marriage and Divorce, containing the draft of a marriage act. This draft was discussed in part at the Detroit Conference in 1909, and the matter referred to a new committee for further action. The result of this action was a new draft, which was presented to the Conference at Chattanooga in 1910. It was considered in Committee of the Whole, and substantially agreed to, but, in view of the importance of the subject matter and of the proposed changes in the law, the Conference deferred action to the next year (1911), recommending that the Committee consider the suggestions made in the course of the discussion, and that the provisions be brought to the notice of the profession and the public at large.

It is partly with a view to making this latter recommendation effective that this article is written, for which however the writer alone assumes responsibility.

(1) *Scope of the Bill* — The proposed measure confines itself to regulations concerning the form of the marriage contract. The scope of the earlier draft was wider in so far as it included an enumeration of the grounds of nullity and voidability of marriages, involving the thorny subjects of impediments and disabilities to marry, both absolute and relative. The elimination of these subjects from the new bill was due to the conviction that with reference to them unanimity between the states cannot at present be in reason expected. The problem of miscegenation is peculiar to

[1] Proceedings of Commissioners at Portland, Maine, 1907, pp. 121–123.

the Southern states, and there is no particular reason why Northern states should be asked to enact stringent laws in that regard. A similar difficulty exists with regard to prohibited degrees of relationship. There is some tendency at present to extend the prohibition to the fourth degree so as to include first cousins; the states favoring this interdiction may not wish to abandon it, while to advocate the extension of this prohibition to all other states would be to place this country in opposition to modern legislation in most other parts of the world. This question does not stand in need of precipitate settlement. There is as a matter of fact at present no basis upon which an agreement regarding impediments and disabilities is likely to be reached, and under these circumstances it is wiser not to offer any uniform plan at all. It is true that in Germany, when, in 1875, the unification of the marriage law was undertaken, the subject of disabilities was included; unfortunately, we have not reached the same degree of unity of sentiment and opinion on vital points.

The regulation of the form of the marriage contract is a distinct and complete subject in itself, and a great step forward will have been taken when uniformity will be established in that regard.

(2) *Abrogation of Common-law Marriage* — The main principle of the proposed bill is the abrogation of the so-called common-law marriage. The Conference of Commissioners at Detroit gave instructions to that effect, with which the members of the Committee concurred unanimously. The case has been so often presented from both sides that it is not necessary to restate it here. There are arguments in favor of supporting the validity of a marriage irrespective of form; if there were not, the principle would not have been sanctioned by the Church for centuries. But there are considerations on the other side, and these, with the great majority of Western nations and peoples, have in the end prevailed. American courts have for a long time leaned strongly in favor of marriage by mere consent; they have interpreted statutes in that spirit, and with the exception of Massachusetts, Maryland, and the Virginias, all states have at one time or other recognized common-law marriages, and the majority recognize them now. There is still a considerable sentiment, if not in their favor, at least against their being refused legal recognition. This found expression in a motion brought forward at the Conference substantially to the

effect that a marriage contract without compliance with the statutory requirements should not be void, but that the parties to such a marriage should derive no rights of property from it.

Whatever may be thought abstractly of such a proposition, a compromise on that basis should be declined, for the following reason: Within recent years a number of states, among them the important jurisdictions of New York and Illinois, have legislated expressly against the validity of common-law marriages by mere consent, overturning their previous policy. The general legislative tendency seems to be in that direction. Should the Commissioners of Uniform State Laws ask these states to reverse their course and go back to a policy which they in common with the majority of civilized communities throughout the world have abandoned? Uniformity is desirable, but not at any price. The measures recommended by the Commissioners should be in the line of progress, and not of retrogression. A uniform marriage law perpetuating the common-law marriage is simply not worth while. If the Conference should decide in favor of the common-law marriage, the wise policy will be, not to embody a provision to that effect in the law, but to leave the subject of the validity of marriage alone, and simply present a measure placing the administrative features of marriage licenses on a uniform basis. That would be some gain, and it would not be a step backward.

Adopting the abrogation of the common-law marriage as the leading principle, the gist of the proposed law is contained in its first section, which provides, in substance, that a marriage may be validly contracted only after a license has been issued therefor, and either before any person authorized by the laws of the state to celebrate marriages, or in accordance with the customs or rules of a religious society, denomination, or sect. In either case the marriage is contracted by the parties declaring in the presence of at least two witnesses that they take each other as husband and wife.

(3) *The Requirement of a License* — It will be noticed that the obtaining of a license is made essential to the validity of a marriage. The prevailing rule in this country is that this requirement is only directory; and even the statutes which might bear a different interpretation are so construed by the courts. Is the proposed departure from the existing law in the direction of increasing strictness justified?

The controlling consideration was that in this way alone adequate recognition is given to the civil character of the marriage contract. In most European countries and in a number of Latin-American states the development has been toward a compulsory civil marriage, solemnized by some state functionary, so that a clergyman cannot even act as the representative of state authority. For such a policy of out and out secularization there is in this country no demand, and it would probably arouse strong opposition. If then we would establish at some point the connection of the state with the marriage relation — and this is desirable not merely from the point of view of civic policy, but for the practical purpose of securing authentic and easily accessible records —, it must be done through the license, which therefore should be given equal legal importance with the solemnization itself.

The marriage license is a well-established institution in this country; since New York adopted it in 1907, it is stated that South Carolina is the only state that does not require it. The requirement is therefore in accordance with popular custom, and will create no friction. Careful provision is made that no marriage shall be invalidated by any error, defect, or irregularity in the issue of the license or in the license itself; parties desiring in good faith to comply with the law run therefore no risk through their own or through official ignorance of technicalities. In order still further to remove the possibility of hardship, a provision was introduced at the Conference and adopted in committee to the effect that where a marriage has been solemnized as required by the act, and the parties have immediately thereafter assumed the habit and repute of husband and wife, and have continued the same uninterruptedly thereafter for at least one year or until the death of either of them, it shall not be lawful to prove that a license has not been issued. Even with a provision less liberal than this it would be difficult to imagine a case in which the mandatory character of the license requirement can work harm or injustice.

It goes without saying that the issue of the license does not operate as a dispensation with any of the substantive disabilities to marry, and it is provided that every license shall contain an express statement to that effect.

(4) *The Issuing of the License* — While it appears from what has been said that the detailed provisions concerning licenses and

their issue do not affect the validity of marriage, they are of great importance from a practical point of view, since their observance is adequately insured by penalties.

The bill does not name the licensing officials; each state is left to select such officers as it chooses, uniformity in that respect being of no great consequence. It is otherwise as to the district from which the license is to issue. One of the recommendations made to the Uniform Divorce Congress was that no license shall issue in any county other than the domicile of one of the applicants. The argument in favor of that position is that the licensing authority of that district is apt to know the parties or one of them, or can inform himself readily as to the truth of their statements, and is therefore less likely to be deceived than an official of another district. It is further supported by the practice of the European states. However, a serious difficulty stands in the way of such a requirement, at least unless it is considerably qualified. Its effect would be to make marriages outside of the state of the domicile of either of the parties impossible. It is true that such a result is accepted in a country like Germany. Parties neither of whom reside in Germany cannot marry under the German law. But a similar exclusiveness would not be appropriate to our states which are practically provinces of one great country. It is quite possible that a woman, earning her living and therefore residing in New York and engaged to marry a resident of New York, may desire to be married from the home of her parents or of a brother or sister who may reside in New Jersey or Connecticut. It is obvious that New Jersey cannot condition solemnization of a marriage within her borders upon a license to be issued in a foreign jurisdiction. It would be necessary to substitute for the license a mere certificate, and leave it to the comity of the other state to comply with the requirements of the New Jersey law. If states are to allow marriages between two non-resident parties, it follows logically that the issuing of licenses cannot be confined to the county of residence or domicile.

The requirement, on the other hand, that the license be issued in the district in which the marriage is to be solemnized is recommended by the advantage it affords with reference to the marriage records. The return of the marriage certificate is more easily secured, if it is to the same county; and if a search is to be made

at any future time for the marriage record, it will be an advantage to know that it must be found in the county of celebration, the place of which is most likely to be known, and not in the county of the domicile, which may be quite unascertainable. The Committee of the Whole at Chattanooga decided in favor of requiring the license to be issued from the county or other district in which the marriage is to be celebrated. The drafting committee, however, has since adopted a compromise, requiring, where the parties are to be married in the state in which either of them resides, a license from the district of such residence, and requiring a license from the district of celebration, where both parties are non-residents of the state. Provision is made whereby the parties are required to state under oath the facts relevant to the issue of the license, and this oath may be taken either at the county of residence or at the county of solemnization. This provision renders it unnecessary, where the license must be obtained from the district of celebration, for a party who lives at a considerable distance from the place of marriage to be there personally five days in advance of the marriage day.

(5) *Preliminary Application* — The bill proposes an innovation upon the law of nearly all the states by requiring a five days' interval between the application for the license and its issue. Since special provision is made for emergency cases, no inconvenience can result from this, and the prescribed delay simply serves to carry out the purpose of the license itself. Formerly the universal practice was, and in the European countries the practice is still, to have the marriage preceded by a publication of banns. The license was originally a special indulgence, meaning a license to dispense with the banns, and in some American states license and banns are still used in the alternative. Most states have finally contented themselves with the more expeditious method of the license; but it is in accordance with the present tendency toward better safeguarding deliberation and legality to give a chance for the bringing forward of objections. Applications for licenses will be posted, and, according to the customary practice, the newspapers will publish them; the bill then makes a provision for the filing of objections and a speedy and summary disposition by the probate court. It may be mentioned that the proposed separation of application and license is in accordance with the law of

Maine. Wisconsin prescribes a delay between the issue of the license and the marriage, but it is obviously better not to have a license issued that is not available, and which, like a check bearing a future date, is apt to create confusion. It may be stated that an advance application for a license was one of the recommendations made to the Uniform Divorce Congress. The license is good for one year only. Such a limit is in accordance with the law of a few states and of most foreign countries. It is clear that circumstances may arise in course of time which may render the statements of the license untrue.

(6) *Form of Marriage* — The normal form of the marriage is the declaration by the parties before an officiating person and two witnesses that they take each other as husband and wife. Three points are to be noted: (1) The law leaves it to each state to determine who has the right to officiate; nearly all states authorize clergymen, judges, and justices of the peace to solemnize marriages, and the disturbance of settled customs in that respect would not be desirable. (2) The declaration that constitutes the efficient act is that of the parties, and not that of the officiating person: this is in accordance with the common law and the law of the Catholic Church, while the law of the Lutheran Church is believed to be different. (3) No particular form of declaration is prescribed, the ceremonial character of the whole act being normally sufficient to insure some explicit utterance. The witnesses are required to be competent, *i. e.*, of sufficient understanding, but their incompetency would not invalidate the marriage.

The bill further sanctions any form that is in accordance with the rites of a religious society. The main purpose is to save the legality of Quaker marriages, in which there is no distinct officiating person, and which are commonly recognized by our laws. The bill as drawn by the committee confined this form of marriage to cases where at least one of the parties is a member of the society. This restriction was opposed and provisionally eliminated at Chattanooga. Perhaps this was due to an impression that the restriction applied to ordinary religious marriages. This, of course, is not true. The ordinary religious marriage is celebrated before a clergyman, and a clergyman is under the provisions of the bill authorized to marry persons of any faith, his own or another. The question is whether the very exceptional and

abnormal form of self-marriage is to be permitted where the religious persuasion of neither of the parties demands it. There seems to be no reason whatever for such a concession. Nor can there be any difficulty in proving that one of the parties was the member of such a religious society.

Since 1860 there has been a law on the federal statute books [2] to the effect that marriages in presence of any consular officer of the United States in a foreign country between persons who would be authorized to marry if residing in the District of Columbia, shall be valid to all intents and purposes, and shall have the same effect as if solemnized within the United States. Under the Constitution, the United States is without authority to render such marriages valid within any state. This is the official view of the government of the United States, as expressed in the Consular Regulations.[3] The general rule, however, that a marriage valid where celebrated is valid everywhere, is recognized (subject to certain exceptions) in every American state, and remains undisturbed by the proposed uniform law. In countries therefore in which by treaty, custom, or positive law, marriages concluded in the presence of an American consul between American citizens are valid, they will continue to be valid, and if the validity of such marriages by the law of the foreign country depends upon the express grant of authority by the sovereignty which the consul represents, such authority is given by § 4082 of the Revised Statutes. Where, however, a marriage concluded in the presence of the American consul is invalid by the laws of the country where it is concluded, § 4082 of the Revised Statutes does not render it valid for any state (no matter what its effect may be for the District of Columbia or a territory), nor is it desirable that such a marriage should be validated. No express provision is consequently called for to deal with this matter.

(7) *Nullity Provisions and Saving Clauses* — The nullity of marriages contracted in violation of the two main requirements of the law which are placed at its head is expressly declared; on the other hand, there is also a careful enumeration of irregularities which do not vitiate the marriage, provided at least one of the parties acts in good faith. In accordance with the law of many

[2] Rev. Stat. § 4082.

[3] See Moore, International Law Digest, § 240.

states, it is provided that a marriage contracted in good faith shall not be void by reason of the want of authority of the officiating person.[4]

Like the laws of many states, the bill requires for the marriage of a minor the consent of his or her parent or guardian. American statutes do not expressly avoid a marriage contracted without such consent, and the courts do not admit that consequence by construction. In England where nullity was expressly declared by Lord Hardwicke's Act, the legislature had to abrogate this provision as one of intolerable hardship. There is however a middle ground which may well be pursued in view of the evil effects of hasty marriages entered into by immature persons. The bill therefore provides that such a marriage shall be voidable upon the application of the minor, or of the parent or guardian. Such application cannot be made after the minor has reached full age and voluntarily cohabits with the other party, nor in any event more than one year after reaching full age. If the application is made by the parent or guardian it must be made within thirty days after obtaining knowledge of the marriage. The court may refuse to grant the application if such refusal shall appear to be advisable.

The bill copies the provision of the law of Massachusetts, according to which a marriage, void by reason of a subsisting prior marriage, but contracted by one of the parties in good faith, is validated by continued cohabitation after the removal of the impediment. The reports show cases where the absence of such a provision led to great hardship.[5] A provision of this kind will be more necessary if the new law shall be adopted than it was ever before. For it was one of the benefits of the recognition of common-law marriages, that it was possible to assume a common-law marriage after the removal of the impediment; under the new régime this expedient would be cut off. An express curative provision therefore becomes necessary to validate the marriage.

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[4] The bill as passed by the committee of the whole contained a clause to the effect that if only one of the parties was ignorant of the want of authority, that party shall have the right to proceed within one year for the annulment of the marriage. Such a case is necessarily one of gross deception practiced upon the ignorant party, and where the ceremony was believed to be, but in reality was not, religious, there may be conscientious scruples against continued cohabitation. Opinion upon this point seems, however, to be divided.

[5] See Collins *v.* Voorhies, 47 N. J. Eq. 315.

(8) *Records* — The bill makes careful provision for the recording of licenses, the return of certificates, etc. A system of state registration is likewise established. The details involve no question of principle, but mere practical considerations of an administrative character. The securing of publicity and of authentic proofs is one of the main objects, and will be one of the chief benefits, of the proposed legislation. Uniformity is here of particular value. Complete and accurate marriage records are essential to a reliable system of vital statistics, and reliable vital statistics are more and more needed with the expanding functions of our social legislation.[6]

Ernst Freund.

UNIVERSITY OF CHICAGO.

AN ACT

Relating to and Regulating Marriage and Marriage Licenses; and to promote Uniformity between the States in reference thereto.

SECTION I. Be it enacted, etc., That marriage may be validly contracted in this State only after a license has been issued therefor, in the manner following:

1. Before any person authorized by the laws of this State to celebrate marriages (and hereinafter designated as the officiating person), by declaring in the presence of at least two competent witnesses other than such officiating person, that they take each other as husband and wife; or,

2. In accordance with the customs, rules, and regulations of any Religious Society, Denomination, or Sect to which either of the parties may belong, by declaring in the presence of at least two competent witnesses, that they take each other as husband and wife.

SECT. II. No persons shall be joined in marriage within this State until a license shall have been obtained for that purpose from the ..... of the ..... in which one of the parties resides; Provided, that if both parties be non-residents of the State, such licenses may be obtained from the ..... of the ..... where the marriage ceremony is to be performed.

SECT. III. Application for a marriage license must be made at least five days before the license shall be issued; Provided, that in cases of emergency, or extraordinary circumstances, the Judge of the Court

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[6] The text of the more important sections of the Act follows.

having Probate Jurisdiction may authorize the license to be issued at any time before the expiration of said five days.

SECT. IV. No license shall be issued unless both of the contracting parties shall be identified to the satisfaction of the proper ....., who shall further require of the parties, either separately or together, a statement under oath relative to the legality of the contemplated marriage, the date of same, the names, relationship, if any, age, nationality, color, residence, and occupation of the parties, the names of the parents, guardians, or curators of such as are under the age of legal majority, any prior marriage or marriages of the parties, or either of them, and the manner of the dissolution thereof; and if there be no legal objection thereto, such ..... shall issue a Marriage License in the form hereinafter prescribed. Or, the parties intending marriage may, either separately or together, appear before any ....., magistrate or justice of the peace of the ..... (whether in this or any other State) wherein either of the contracting parties resides, or of the ..... where the marriage is to be performed, who shall require of them a statement under oath as above provided; and such statement, having been duly subscribed and sworn to, and the parties having been duly identified, shall be forwarded to the proper ....., who, if satisfied after an examination thereof, that the same is in proper legal form, and that no legal objection to the contemplated marriage exists, shall issue a license therefor.

SECT. V. No license shall be issued if either of the contracting parties be under the marriageable age of consent as established by law. If either of the contracting parties be between the marriageable age of consent as established by law, and the age of legal majority, to wit, between ..... years and ..... years, if a male, and between ..... years and ..... years, if a female, no license shall be issued without the consent of his or her parents, guardian, or curator, or of the parent having the actual care, custody, and control of such minor or minors, given before the ..... under oath, or certified under the hand of such parents, guardian or curator as aforesaid, and properly verified by affidavit before a Notary Public or other official authorized by law to take affidavits, which certificate shall be filed of record in the office of said ..... and entered by him on the Marriage License Docket before issuing said license; Provided, that if there be no guardian or curator of either or both of such minors, or if there be no competent person having the actual care, custody, and control of such minor or minors, then the Judge of the ..... of the residence of the minor having Probate Jurisdiction may, after hearing, upon proper cause shown, make an order allowing the marriage of such minor or minors.

SECT. VI. Immediately upon entering an application for a license, the ..... shall post in his office a notice giving the names and residences of the parties applying therefor, and the date of the application. Any person believing that the statements of the application are false or insufficient, or that the applicants or either of them are incompetent to marry, may file with the Court having Probate Jurisdiction in the ..... in which the license is applied for, a petition under oath, setting forth the grounds of objection to the marriage, and asking for a rule upon the parties making such application to show cause why the license should not be refused. Whereupon, said Court, if satisfied that the grounds of objection are prima facie valid, shall issue a rule to show cause as aforesaid, returnable as the Court may direct, but not more than ten days from and after the date of said rule, which rule shall be served forthwith upon the applicants for such license, and upon the clerk before whom such application shall have been made, and shall operate as a stay upon the issuance of the license until further ordered. If, upon hearing, the objections be sustained, the Court shall make an order refusing the license; the costs to rest in the discretion of the Court; but if the objections be overruled, the party or parties filing the same shall be liable for all costs of the proceedings.

SECTS. VII, VIII, and IX provide for penalties, blank forms, and dockets.

SECT. X. The license shall authorize the marriage ceremony to be performed in any ..... of this State, excepting that where both parties are non-residents of the State, the ceremony shall be performed only in the ..... in which the license is issued. The license shall be directed "to any person authorized by the law of this State to solemnize marriage," and shall authorize him to solemnize marriage between the parties therein named, at any time not more than one year from and after the date thereof. If the marriage is to be solemnized by the parties without the presence of an officiating person, as provided by paragraph two of Section one of this Act, the license shall be directed to the parties to the marriage. If either of the parties be not of the age of legal majority, then his or her age shall be stated, and the fact of the consent of his or her parents, guardian, or curator shall likewise be stated; and if either of said parties shall have been theretofore married, then the number of times he or she shall have been previously married, and the manner in which the prior marriage or marriages was or were dissolved, shall be stated. The officiating person shall satisfy himself that the parties presenting themselves to be married by him are the parties named in the license; and if he knows of any legal impediment to such marriage, he shall refuse to perform the ceremony. The issue of a license

shall not be deemed to remove or dispense with any legal disability, impediment or prohibition rendering marriage between the parties illegal, and the license shall contain a statement to that effect.

SECTS. XI and XII give the form of marriage licenses.

SECT. XIII. The license shall have appended to it three certificates, numbered to correspond with the license, (one marked "original," one marked "duplicate," and one marked "triplicate,") which shall be in form substantially as follows:

[The forms are omitted.]

SECT. XIV. The Marriage Certificates marked "original" and "duplicate," duly signed, shall be given by the officiating person to the persons married by him; and the certificate marked "triplicate" shall be returned by such officiating person, or, in the case of a marriage ceremony performed without an officiating person, then by the parties to the marriage contract, or either of them, to the ..... who issued the license, within thirty days after the date of said marriage.

SECT. XV. The said ..... upon receiving such triplicate certificate, shall immediately enter the same on the Docket where the Marriage License of said parties is recorded, and place such certificate on file.

SECTS. XVI–XXI provide for penalties.

SECT. XXII. A copy of the record of the Marriage License, and Marriage Certificate, certified under the hand of said ..... and the seal of the court, shall be received in all courts of this State as prima facie evidence of such marriage between the parties therein named.

SECT. XXIII. All marriages hereafter contracted in violation of any of the requirements of Section I of this Act shall be null and void, (except as provided in Sections XXIV and XXV of this Act); Provided, that the parties to any such void marriage may, at any time, validate such marriage by complying with the requirements of this Act, and the issue thereof, if any, shall thereupon become legitimate, as provided by Section XXVIII of this Act.

SECT. XXIV. No marriage hereafter contracted shall be void by reason of want of authority or jurisdiction in the officiating person solemnizing such marriage, if the marriage is in other respects lawful, and is consummated with the full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.

SECT. XXV. No marriage hereafter contracted shall be void either by reason of the license having been issued without the consent of the parents, guardian, or curator of a minor, or by a ..... not having jurisdiction to issue the same, or by reason of any omission, informality,

or irregularity of form in the application for the license or in the license itself, or by reason of the incompetency of the witnesses to such marriage, or because the marriage may have been solemnized in a ..... other than the ..... prescribed in Section X of this Act, or more than one year after the date of the license, if the marriage is in other respects lawful and is consummated with the full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage. Where a marriage has been celebrated in one of the forms provided for in Section I of this Act, and the parties thereto have immediately thereafter assumed the habit and repute of husband and wife, and have continued the same uninterruptedly thereafter for the period of one year, or until the death of either of them, it shall not be lawful to prove that a license has not been issued as required by this Act.

SECT. XXVI. A marriage contracted by a person requiring the consent of a parent, guardian, or curator, without such consent, shall be voidable upon the application of such person, or of the parent, guardian, or curator of such person, but no such application shall be made after the party requiring consent has reached the age of legal majority and has voluntarily cohabited with the other party, or in any event more than one year after such party has reached the age of legal majority; Provided, that no such marriage shall be avoided upon the application of the parent, guardian, or curator, unless such application shall be made within thirty days after acquiring knowledge of such irregular marriage. The Court may refuse to grant the application if such refusal shall appear to be advisable. Any Court having jurisdiction to grant divorces shall have power to annul a marriage as provided by this section. But the issue of such marriage shall not be deemed illegitimate.

SECT. XXVII. If a person during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsequent marriage contract in accordance with the provisions of Section I of this Act, and the parties thereto live together thereafter as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, or that the former marriage had been annulled, or dissolved by a divorce, or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by the death, or divorce of the other party to such former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment, and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents.

SECT. XXVIII. In any and every case where the father and mother of an illegitimate child or children shall lawfully intermarry, such child or children shall thereby become legitimated, and enjoy all the rights and privileges of legitimacy as if they had been born during the wedlock of their parents, and this section shall be taken to apply to all cases prior to its date, as well as those subsequent thereto; Provided, that no estate already vested shall be divested by this Act.

SECT. XXIX. The ..... of each ..... shall, on or before the first day of February in each year, make return to the ..... of this State, upon suitable blank forms to be provided by the State, of a statement of all Marriage Licenses issued by him during the preceding calendar year, including all the facts required to be ascertained by him upon the issuing of each license, and shall also make return of a statement of all Marriage Certificates which shall have been returned to him during such period, and upon neglect or refusal so to do, such ..... shall forfeit and pay the sum of one hundred dollars for the use of the proper. . . .

SECT. XXX. This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it.

SECT. XXXI. Provides for fees. . . .

SECT. XXXII. Repealing clause.

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THE FEDERAL CORPORATION TAX. — In 1909, Congress imposed on every corporation organized in, or doing business in, any state of the United States, a special excise tax, with respect to doing business, equivalent to one *per centum* upon its entire net income over and above $5000.[1] The Supreme Court of the United States unanimously upheld the constitutionality of this tax. *Flint* v. *Stone Tracy Co.*, U. S. Sup. Ct., March 13, 1911.[2]

[1] The full wording of this part of the statute is: "That every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any state or territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any state or territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its territories, Alaska and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed." U. S. St., 1909, ch. 6, § 38.

[2] Fifteen cases were decided under this opinion. On the same day the court held that trusts not organized under statutes but recognized at common law were not within the act, Eliot *v.* Freeman, U. S. Sup. Ct., March 13, 1911, and that a corpora-

The strongest argument against the tax was that it is a direct tax, and, not being "apportioned among the several states . . . according to their respective numbers," it contravenes Art. I, § 2, of the Constitution. No definition of "direct tax" has yet been generally accepted.[3] Capitation taxes[4] and taxes on land are unquestionably direct;[5] but the Supreme Court has never considered as direct, taxes on privileges and transactions,[6] which class includes excise taxes.[7] In 1895, it laid down the doctrine that a tax on the income from land and on the income from personal property amounts to a tax on the land and personal property itself, and is direct.[8] Both before and since this decision, however, the court has consistently held that the fact that a tax is measured by income from property does not make it direct.[9] The distinction seems a strange one,[10] but it is at least well-defined; the test is whether the tax is imposed on property solely because of its ownership.[11] Although the mere declaration in a statute that a tax is an excise does not make it so,[12] the holdings of the Supreme Court make practically everything turn on the object expressed, rather than the mode of measurement.[13] And the measure of a tax may be property which is itself non-taxable.[14]

The second great objection made to the statute was that it taxes franchises created not by the United States but by the states. The Constitution gives Congress power to lay and collect excises;[15] if affirmative justification were needed for the power to levy this kind of an excise it could be found in the facts that the federal government does give state-created corporations the benefit of its protection,[16] and that its revenue must be obtained from the same territory, property, and activities which

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tion whose sole function is to hold title to land, and to distribute its rentals, is not doing business within the meaning of the act, Zonne *v.* Minneapolis Syndicate, U. S. Sup. Ct., March 13, 1911.

[3] See 20 HARV. L. REV. 280; 24 *id.* 31; 2 THAYER, CASES ON CONSTITUTIONAL LAW, note, 1325–1327.

[4] U. S. CONST., Art. I, § 9, contains the language, "No capitation or other direct tax."

[5] See Veazie Bank *v.* Fenno, 8 Wall. (U. S.) 533, 544; JUDSON, TAXATION, 648.

[6] See Hylton *v.* United States, 3 Dall. (U. S.) 171; Spreckels Sugar Refining Co. *v.* McClain, 192 U. S. 397.

[7] For definitions of "excise" see Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429, 592; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 680. And for a list of taxes upheld by the Supreme Court as excises, see GRAY, LIMITATIONS OF TAXING POWER, 352.

[8] Pollock *v.* Farmers' Loan & Trust Co., 158 U. S. 601. Probably taxes on incomes from sources other than real or personal property would not be direct. See JUDSON, TAXATION, 652.

[9] Springer *v.* United States, 102 U. S. 586; Knowlton *v.* Moore, 178 U. S. 41; Spreckels Sugar Refining Co. *v.* McClain, *supra.*

[10] See 9 HARV. L. REV. 207; 20 *id.* 280.

[11] See Knowlton *v.* Moore, *supra*, 41, 81, 82.

[12] See Galveston, Harrisburg & San Antonio Ry. Co. *v.* Texas, 210 U. S. 217; Western Union Tel. Co. *v.* Kansas, 216 U. S. 1.

[13] See Bank Tax Case, 2 Wall. (U. S.) 200; Home Ins. Co. *v.* New York, 134 U. S. 594; Spreckels Sugar Refining Co. *v.* McClain, *supra.*

[14] Maine *v.* Grand Trunk Ry., 142 U. S. 217; Plummer *v.* Coler, 178 U. S. 115.

[15] U. S. CONST., Art. I, § 8.

[16] One of the federal Circuit Courts recently resorted to this sort of argument to sustain another form of excise tax. United States *v.* Billings, 44 N. Y. L. J. 2593, 2594.

the states tax.[17] But it is enough that there is no express constitutional limitation on this sort of thing.[18] The only implied restriction is that the federal government shall not cripple a state in the exercise of its governmental functions;[19] but corporations, even so-called public service companies, are not actual agencies of the state. Even if Congress by taxation virtually destroyed such state franchises, the courts could give no remedy.[20]

Another objection considered in the principal case was that the distinction between a business carried on by a corporation and one carried on by a partnership or individual violated the constitutional provision[21] that "all excises . . . shall be uniform throughout the United States." This clause, however, demands only geographical uniformity;[22] and, moreover, the difference between corporations and partnerships is a substantial one.[23] The various other objections the court dismissed with little difficulty.[24]

In summary, it may be said that the case of *Flint* v. *Stone Tracy Co.* is important for two reasons: it settles a question of vast importance to business interests throughout the whole country, and to the federal, and incidentally to the state, revenue; and it establishes firmly the distinction between a tax on income from property and a tax on a privilege measured by that income. But as each link in the chain of reasoning necessary to support the tax had previously been decided by the Supreme Court, it forms no notable addition to the constitutional history of taxation.

WAIVER OF STOCKHOLDERS' LIABILITY. — In a recent case the plaintiff, relying on the representation that the shares of corporate stock had been fully paid for, purchased bonds of the corporation, each bond containing a waiver of all remedies against the stockholders. The stock had in fact been paid for with land accepted at a gross overvaluation; and, upon the corporation's becoming insolvent, this action was brought to recover the balance due on the shares. The court held the shareholders liable since the waiver was not intended to include any right arising from misrepresentation. *Downer* v. *Union Land Co.*, 129 N. W. 777 (Minn.). By the better authority a person dealing with a corporation may by express agreement waive a constitutional or statutory liability of the stockholders and agree to look only to the corporation and

[17] This was pointed out by the court in the principal case.
[18] See GRAY, LIMITATIONS OF TAXING POWER, 345.
[19] See South Carolina *v.* United States, 199 U. S. 437, 461.
[20] But *cf.* Flaherty *v.* Hanson, 215 U. S. 515.
[21] U. S. CONST., Art. I, § 8.
[22] Knowlton *v.* Moore, *supra.*
[23] See Flint *v.* Stone Tracy Co., *supra*, 563.
[24] The other objections were, in brief, as follows: that the bill did not originate in the House of Representatives; that the method of measuring the tax is arbitrary; that the $5000 limit is arbitrary; that the exception of certain associations is arbitrary; that the details of deducting interest payments by banks are arbitrary; and that the provision regarding tax returns involves unreasonable searches and seizures. The court declined to consider the objection that foreign corporations, doing a local business in a state, are not within the control of Congress for taxing purposes, as no such case was presented in the record.

its property for the payment of his debt.[1] But it is a general principle of the law of waiver that there must be the intentional relinquishment of a known right; in other words, there must be knowledge of all the facts and circumstances attending the creation of the right alleged to have been waived.[2] The liability in this case is based not on a statutory provision but on a misrepresentation of fact in stating the amount of capital to be greater than it was.[3] And as this circumstance was wholly unknown to the plaintiff, the court in arriving at its decision merely applied the general principle of waiver in construing the agreement, and held such right not to have been within the contemplation of the parties and therefore not included in the waiver.

An interesting question is left unsettled, as to whether there may be express provision against such liability. While the defense of fraud in a contract may be waived subsequently to its discovery by the defrauded person,[4] a stipulation in the original contract waiving that defense is generally held invalid, either on the ground that the waiver being part of the fraudulently obtained contract was itself obtained by fraud and is therefore invalid, or because public policy forbids such agreements.[5] This rule has not been universally followed,[6] especially in the case of incontestability clauses in insurance policies.[7] A waiver of any right of action arising out of the contract would necessarily be governed by the same principles as a waiver of a defense to an action on the contract. Where an agreement provided that the plaintiff must verify all representations for himself and not rely on their accuracy, it was construed to mean an assumption by him of the risk of honest mistakes but not of fraud,[8] and a similar interpretation would be placed on a provision referring to a particular representation. An express stipulation in the bond to the effect that the bondholder has in no way relied on any representation that the stock has been paid in full should be held valid since it takes effect not as a waiver of an existing right of action but as showing no reliance on the representation and hence no fraud in the transaction. But the courts would be very astute in ferreting out some fraud as a ground for setting the contract aside, and would be especially inclined to do so if not clearly shown that the bondholder had actual notice of the stipulation.[9] In jurisdictions where the stockholders' liability in such cases is based on the "trust fund" theory,[10] no difficulty would arise where the bondholder actually knew of the stipulation, since a right in the trust fund may be released and a sufficient consideration for the release is found in the issuing of the bond to him.

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[1] Bush *v.* Robinson, 95 Ky. 492. *Contra*, Kreisser *v.* Ashtabula Gas Light Co., 24 Oh. Cir. Ct. Rep. 313.

[2] Fairview R. Co. *v.* Spillman, 23 Or. 587, 592.

[3] Hospes *v.* Northwestern Mfg. Co., 48 Minn. 174, 197.

[4] Wheeler *v.* McNeil, 101 Fed. 685.

[5] Bridger *v.* Goldsmith, 143 N. Y. 424.

[6] For example, in the case of building contracts where provision is made that the architect's certificate cannot be set aside on grounds of fraud or collusion. Tullis *v.* Jacson, [1892] 3 Ch. 441. *Contra*, Redmond *v.* Wynne, 13 N. S. W. L. Rep. 39.

[7] See 24 HARV. L. REV. 53.

[8] Pearson *v.* Dublin Corporation, [1907] A. C. 351.

[9] See Greenwood *v.* Leather Shod Wheel Co., [1900] 1 Ch. 421, 437.

[10] See 20 HARV. L. REV. 401. This theory is that the corporation holds in trust for its creditors any right against shareholders for amounts due on their stock.

JURISDICTION OVER MOVABLE PROPERTY BROUGHT INTO A STATE WITHOUT THE OWNER'S CONSENT. — In spite of frequent repetitions of the statement, especially in the earlier authorities, that rights in movable property depend on the law of the owner's domicile,[1] the rule now seems to be that, at least in so far as they are affected by transactions *inter vivos*, it is the law of the *situs* which governs.[2] Undoubtedly the basis for the rule is found in the complete power of the state throughout its own territory, so that any sound exception made to it must rest on an examination of that principle. Although it has often been asserted that all property within a certain territory is absolutely subject to the control of its sovereign,[3] it does not necessarily follow that the sovereign has absolute control over the rights of the former owner of such property. Whenever property is in the territory of a state with the consent of the owner, the state has power, not only over its physical disposition, but also over the owner's title, which he has impliedly subjected to the control of the state by placing his property under its protection.[4] This justifies the supremacy of the law of the *situs* in the great mass of cases, but it is not a necessary conception that rights in property are entirely dependent on its physical control, even by a sovereign; the contrary assertion would imply that national power was based rather on *brutum fulmen* than on justice or law. Although a state can control the possession of property brought within it without the consent of its owner, it is submitted that, since he has not subjected his title to its control, it has no power to affect title,[5] unless it has personal jurisdiction over him.

Although, because of the infrequency with which such situations arise, the cases in point are necessarily few, what authority there is seems to be consistent with the view here advanced. Thus it has been expressly held that where property is transferred in a manner which passes a good title by the law of the *situs*, but not by the law of the state where the owner is domiciled and from which the property was taken without his consent, if it is brought back to that state he can successfully assert his title to it.[6] In apparent recognition of this doctrine, it has also been held that an attachment, levied in a state where the property was brought without the owner's consent, will be dissolved. *Houghton* v. *May*, 17 Ont. W. Rep. 750 (High Ct., Dec. 15, 1910).[7]

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[1] See Ames Iron Works *v.* Warren, 76 Ind. 512; STORY, CONFLICT OF LAWS, § 376 *et seq.*

[2] Green *v.* Van Buskirk, 5 Wall. (U. S.) 307; 7 Wall. (U. S.) 139; Castrique *v.* Imrie, L. R. 4 H. L. 414, 429. See WHARTON, CONFLICT OF LAWS, § 297 *et seq.*

[3] See STORY, CONFLICT OF LAWS, § 390; DICEY, CONFLICT OF LAWS, 378.

[4] But this power is not always exercised. See The Belgenland, 114 U. S. 355. The exemption from jurisdiction of warships, ambassadors, etc., seems to be based on reciprocal forbearance. See The Schooner Exchange *v.* M'Faddon, 7 Cranch (U. S.) 116, 136; HALLECK, INTERNATIONAL LAW, 230; 24 HARV. L. REV. 489.

[5] Somewhat analogous is the rule that a creditor cannot be deprived of his right by the debtor's discharge in insolvency, given by a state in which the creditor is not domiciled, and to whose jurisdiction he has not submitted. Baldwin *v.* Hale, 1 Wall. (U. S.) 223; Felch *v.* Bugbee, 48 Me. 9. Similarly, on principle, there should be no jurisdiction for garnishment unless the state has jurisdiction over both the debtor and creditor. See 23 HARV. L. REV. 134.

[6] Edgerly *v.* Bush, 81 N. Y. 199; Wylie *v.* Speyer, 62 How. Prac. (N. Y.) 107. See Todd *v.* Armour, 19 Sc. L. R. 656.

[7] See Powell *v.* McKee, 4 La. Ann. 108; Deyo *v.* Jennison, 10 Allen (Mass.) 410; Timmons *v.* Garrison, 4 Humph. (Tenn.) 148. The authority of most of these cases

Aside from a few *dicta*,[8] the decisions apparently opposed to this view are distinguishable. A state may try a person criminally for a violation of its laws, though he was illegally and against his will brought within its jurisdiction from another state, unless that state objects on the ground of some treaty right.[9] Here, however, though there might be some question whether the court ought to take jurisdiction,[10] there can be no doubt that the sovereign has complete power over the person of the defendant, and that by violating its laws he has subjected himself to the risk of punishment in such a contingency. It is more difficult consistently to explain the well-recognized power of prize courts to pass title to captured vessels good against the whole world.[11] But on theory it would seem that when a vessel is sent to sea in time of war, its owner takes the risk of its capture, and in that case, for his own protection, impliedly submits the determination of his rights to a court which is recognized by the law of nations to have jurisdiction.[12]

CORPORATE SURETYSHIP AS A BRANCH OF INSURANCE. — The advent of the modern surety company has produced a series of decisions in which it has been repeatedly asserted that contracts entered into by these corporations for the purposes of gain are to be regarded as insurance policies, and governed by the law applicable thereto, rather than by the specialized body of doctrine embraced in the law of suretyship and guaranty.[1] In view of the comparatively recent origin of this business, the decisions are few which show more than a general tendency to treat the bond or policy of a surety company as subject to different rules than those governing the contract of a private surety. Yet in several important respects this tendency is very marked.

Of growing significance are the decisions that surety companies must comply with the insurance laws governing incorporation [2] and the right to do business.[3] Similarly, the right of a corporate surety to make its own contract is abridged by enactments declaring that no breach of

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is weakened by the fact that the creditor is usually instrumental in getting the property into the jurisdiction, so that the general rule would apply, that an attachment based on possession illegally obtained is void. See Ilsley *v.* Nichols, 12 Pick. (Mass.) 270; Closson *v.* Morrison, 47 N. H. 482.

[8] See Cammell *v.* Sewell, 5 H. & N. 728; Alcock *v.* Smith, [1892] 1 Ch. 238, 267.

[9] Pettibone *v.* Nichols, 203 U. S. 192; *Ex parte* Scott, 9 B. & C. 446.

[10] Where the defendant is enticed into the state by fraud so as to be served with process in a civil proceeding, the court will not take jurisdiction. State *v.* Yauger, 29 N. J. L. 384. As to privilege of non-resident parties and witnesses from service of process, see 23 HARV. L. REV. 474.

[11] See Hughes *v.* Cornelius, 2 Show. 232; The Richmond *v.* United States, 9 Cranch (U. S.) 102; Grant *v.* M'Lachlin, 4 Johns. (N. Y.) 34.

[12] A vessel in port in time of peace is generally there with the owner's consent, so there is no difficulty in supporting the ordinary doctrine of admiralty jurisdiction. But in an international reference it was decided, in accord with the theory of this note, that where a vessel was taken to Nassau by a mutinous crew against the owner's consent, there was no jurisdiction to free the slaves on board. See WHEATON, INTERNATIONAL LAW, 6 ed., cxxxi (The Creole).

[1] See Bank of Tarboro *v.* Fidelity & Deposit Co., 128 N. C. 366; American Surety Co. *v.* Pauly, 170 U. S. 133.

[2] People *v.* Rose, 174 Ill. 310.

[3] Claflin *v.* U. S. Credit System Co., 165 Mass. 501.

warranty shall render an insurance policy void unless the fact warranted be material.[4] On the other hand, it is well settled that there must be actual fraud to render the contract of a private surety voidable for concealment or misrepresentation;[5] but a contract of guaranty insurance is one of the greatest good faith, and is rendered voidable by an innocent non-disclosure or misrepresentation.[6]

A further distinction has been made between the obligation of a corporate and private surety. The latter is a favorite of the law and his contract is *strictissimi juris*. The slightest alteration of his principal's obligation or duties, whether for better or for worse, will discharge him from all liability.[7] Yet, though the contract of a surety company be in form and substance the same as that of a private surety, it may not avail itself of this defense,[8] unless there be a considerable change or substitution in the principal's contract.[9] However just this result may be, the reasoning of many courts does not put the matter on a satisfactory basis. It is said that this is a contract of insurance and must be construed strictly against the insurer, that the purpose of the agreement, namely indemnity to the insured, may be carried out: hence the rule of *strictissimi juris* would defeat the object of the policy.[10] To this effect is the recent case of *Hormel & Co.* v. *American Bonding Co.*, 128 N. W. 12 (Minn.).

The objection to this reasoning is that the rule of *strictissimi juris* is not a rule of construction.[11] The contract of a private surety, like that of an insurer, is to be construed strictly against the surety, as he is the author of the language.[12] But, when the meaning of the language is once ascertained, the private surety is entitled to stand on the letter of his contract.[13] It is submitted that contracts of guaranty entered into by a corporation for the purpose of gain are as much contracts of suretyship as insurance. It is common ground. But the public demand that these contracts be enforced has rendered inevitable a line of cases which, in effect, decide that this portion of suretyship law is not applicable to the contracts of surety companies.[14] This reasoning is, moreover, consistent with those cases in which the surety escapes liability because the contract or duties of the principal have been so far altered that, to use insurance terms, the breach thereof is no longer a "peril" insured against.[15]

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[4] Champion Ice Mfg. & Cold Storage Co. *v.* American Bonding & Trust Co., 151 Ky. 863; Village of London West *v.* London Guarantee & Accident Co., 26 Ont. 520.

[5] The North British Ins. Co. *v.* Lloyd, 10 Exch. 523; Ham *v.* Greve, 34 Ind. 18.

[6] U. S. Fidelity & Guaranty Co. *v.* First Nat. Bank of Dundee, 233 Ill. 475. *Contra*, Byrne *v.* Muzio, 8 L. R. Ir. 396.

[7] Page *v.* Krekey, 137 N. Y. 307; Daube *v.* Phila. & Reading Coal & Iron Co., 77 Fed. 713; Erickson *v.* Brandt, 53 Minn. 10.

[8] Walker *v.* Holtzclaw, 57 S. C. 459; American Bonding Co. *v.* City of Ottumwa, 137 Fed. 572; Guaranty Co. *v.* Pressed Brick Co., 191 U. S. 416.

[9] Sun Life Ins. Co. *v.* U. S. Fidelity & Guaranty Co., 130 N. C. 129. If the bond in terms covers any employment in which the principal may serve, a change in the principal contract will not release the surety. Fidelity & Casualty Co. *v.* The Gate City Nat. Bank, 97 Ga. 634.

[10] See Guaranty Co. *v.* Pressed Brick Co., *supra*.

[11] Gamble *v.* Cuneo, 21 N. Y. App. Div. 413. See 3 KENT, COMM. 124.

[12] Rindge *v.* Judson, 24 N. Y. 64; Hargreave *v.* Smee, 6 Bing. 244.

[13] Allison *v.* Rutledge, 5 Yerg. (Tenn.) 193; Smith *v.* Montgomery, 3 Tex. 199.

[14] See 19 Green Bag, 613.

[15] Sun Life Ins. Co. *v.* U. S. Fidelity & Guaranty Co., *supra*.

THE APPLICATION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION TO COMPULSORY STATEMENTS OUT OF COURT. — In a recent New York case a statute requiring an operator of an automobile, who does damage to persons or property, to report to the police his name, address, and license number and the fact of the injury,[1] was held unconstitutional as violating the provision that no one shall "be compelled in any criminal case to be a witness against himself." *People* v. *Rosenheimer*, 44 N. Y. L. J. 1629 (Ct. Gen. Sess., N. Y. County, Jan. 1911).

The scope of such constitutional provisions as the above which, with varying language, exist in nearly every state, must be taken as neither greater nor less than that of the common-law privilege against self-incrimination.[2] Thus interpreted, the constitutional protection extends at least to every form of judicial proceeding. Thus it has been applied to proceedings before grand juries,[3] to examinations before legislative investigating committees,[4] and to civil cases.[5] If the question is one the answer to which may incriminate, the nature of the tribunal in which it is asked is immaterial. It has been said, however, that "the privilege covers only statements made in court under process as a witness."[6] But it may well be doubted whether it is so limited. It would seem, for example, that a statute requiring a man in the position of the defendant in the principal case to describe the particulars of the occurrence would violate the purpose of the privilege.

Assuming, then, that the privilege may extend to proceedings out of court, is it infringed by the provisions of this statute? Statutes requiring druggists in prohibition districts to make public records or weekly sworn statements of their sales of liquor, and the purposes thereof, have been upheld, and these records used in prosecutions for illegal sales.[7] The privilege is not to be so extended as to nullify any requirement that a man do an act which may by possibility incriminate him.[8] And there seems to be no bright line between requirements which do not and those which do violate the privilege. It must be purely a question of degree. On principle, however, it would seem that the test should be whether a primary object or effect of the requirement is to secure evidence for a criminal prosecution. The primary object and effect of the liquor

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[1] The full wording of the statutory provision is as follows: "Any person operating a motor vehicle who, knowing that injury has been caused to a person or property, due to the culpability of said operator or to accident, leaves the place of said injury or accident without stopping and giving his name, residence, including street and street number, and operator's license number to the injured party, or to a police officer, or in case no police officer is in the vicinity of the place of said injury or accident, then reporting the same to the nearest police station or judicial officer, shall be guilty of a felony." N. Y. LAWS OF 1910, ch. 374, sec. 290, subdiv. 3.

[2] See Counselman *v.* Hitchcock, 142 U. S. 547, 584; 3 WIGMORE, EVIDENCE, § 2252.

[3] Counselman *v.* Hitchcock, *supra;* People *v.* Argo, 237 Ill. 173.

[4] Emery's Case, 107 Mass. 172.

[5] Wilkins *v.* Malone, 14 Ind. 153; *Ex parte* Senior, 37 Fla. 1; Kellogg *v.* Sowerby, 32 N. Y. Misc. 327.

[6] 3 WIGMORE, EVIDENCE, § 2266.

[7] State *v.* Henwood, 123 Mich. 317; State *v.* Davis, 69 S. E. 639 (W. Va.); State *ex rel.* McClory *v.* Donovan, 10 N. D. 203; State *v.* Davis, 108 Mo. 666.

[8] In addition to the liquor license cases, *supra*, a statute requiring operators of automobiles to display their license numbers in plain sight has been upheld. People *v.* Schneider, 139 Mich. 673.

statutes mentioned above seems to be to regulate sales of liquor, and to prevent, rather than to detect, abuses of the druggist's license. The fact that an incidental result may be to obtain evidence of illegal sales does not make the statute void. On the other hand, a statute, compelling an examination of brokers' books with a view to ascertaining whether or not taxes had been paid, was, it would seem properly, held unconstitutional.[9] And so in the principal case, a primary effect, if not a primary object, of the requirement is to compel the acknowledgment of facts which are likely to be the basis of a prosecution. While courts should guard against extending the privilege against self-incrimination, they are bound to recognize its existence, and it would seem that the statute in question was properly held unconstitutional.

It has been suggested that when the defendant takes out his license, he voluntarily assumes the obligation to give this information.[10] This argument can of course only apply where the license is obtained after the passage of the statute. And, even then, it is a mooted question how far the obtaining of licenses may be conditioned upon waiver of constitutional rights. Decisions as to the validity of conditions imposed by states upon foreign corporations seeking to do intrastate business furnish an interesting analogy.[11]

STATUTORY RESTRICTIONS ON WARRANTIES IN INSURANCE POLICIES. — In several of our states, statutes have been enacted, which limit the effect of untrue statements made in negotiating an insurance policy. These statutes provide that no policy shall be voided by a false representation, unless it be material to the risk or wilfully false.[1] Their purpose is to restrict the right of an insurance company to make the validity of the contract dependent upon the accuracy of answers to numerous frivolous questions.[2] Being remedial in their nature, the courts have construed them so as to apply as well to warranties as to collateral representations.[3]

It has also been asserted by way of *dictum*, that these statutes have abolished the common-law distinction between representations and

[9] People *ex rel.* Ferguson *v.* Reardon, 197 N. Y. 236. But see a criticism of this case in 21 HARV. L. REV. 621.

[10] See State *v.* Davis, 108 Mo. 666, 670. The holding of the case seems, however, correct.

[11] These decisions relate mainly to conditions that the foreign corporation shall not remove its actions to the federal courts. The state may take away the privilege of doing intrastate business for breach of this condition. Doyle *v.* Continental Ins. Co., 94 U. S. 535; Security Mutual Life Ins. Co. *v.* Prewitt, 202 U. S. 246. But an agreement not to remove, exacted as a condition precedent to doing such business, is void. Insurance Co. *v.* Morse, 20 Wall. (U. S.) 445; Barron *v.* Burnside, 121 U. S. 186. See 23 HARV. L. REV. 549.

[1] A typical statute is that of Pennsylvania: "No misrepresentation or untrue statement made in an application, made in good faith, shall effect a forfeiture or be a ground of defense, unless such misrepresentation or untrue statement relate to some matter material to the risk." PURD. DIG. 1953, § 66.

[2] Anderson *v.* Fitzgerald, 4 H. L. Cas. 484; Jeffries *v.* Life Ins. Co., 22 Wall. (U. S.) 47 (untrue statement that insured was single).

[3] White *v.* Conn. Mut. Life Ins. Co., Fed. Cas. No. 17,545; White *v.* Provident Savings Life Assur. Soc., 163 Mass. 108. The statute does not apply to promissory warranties. Gross *v.* Colonial Assur. Co., 121 S. W. 517 (Tex. Civ. App.).

warranties,[4] but it may be doubted whether such effect has actually been given them by the courts. That the fact warranted must be material, in the technical sense of that term, is well settled. The parties cannot make a fact material by an express stipulation,[5] but that question is to be determined by the jury,[6] or, if there is no dispute on the facts, by the court.[7] "A fair test of materiality of a fact is found in the answer to the question, whether reasonably careful and intelligent men would have regarded the fact, communicated at the time of effecting the insurance, as substantially increasing the chances of the loss insured against." [8] But beyond this the decisions have not applied the statute. Given the falsity and materiality of the fact represented, the common-law rule as to warranties applies, and the policy is avoided by the breach.[9] To this effect is a recent decision under a statute, which in terms provides that all warranties shall be deemed representations, and void the policy only when material or wilfully false.[10] *Continental Casualty Co.* v. *Lindsay*, 69 S. E. 344 (Va.). Where it clearly appeared to the court that a statement as to the relationship between the assured and beneficiary was false and material, the policy was voidable.

In these decisions an important distinction between warranties and representations is preserved. At common law a collateral representation does not avoid the policy unless, in addition to being false and material, it has affected the willingness of the underwriter to issue the particular policy in question, and whether it did or not is a question for the jury.[11] The reason that a policy is voided for misrepresentation, is that it is not just to hold the insurer to a contract that he would not have made, had he known the true facts. A warranty, on the other hand, is a part of the contract, and in the nature of a condition precedent.

For the above reason, it would seem that the effect of such enactments has been comparatively limited, in so far as it has removed the distinction between warranties and representations. It was always true that, like a warranty, a collateral representation of an immaterial fact would have the same effect as though material, if such fact were made the subject of inquiry by the insurer.[12] So, in this respect, warranties and repre-

[4] See Hartford Life Ins. Co. *v.* Stalling, 110 Tenn. 1, 7.

[5] Fidelity Mut. Life Ass'n *v.* Ficklin, 74 Md. 172; Hermany *v.* Fidelity Mut. Life Ass'n, 151 Pa. St. 17.

[6] Hermany *v.* Fidelity Mut. Life Ass'n, *supra;* Mobile Fire Dept. Ins. Co. *v.* Miller, 58 Ga. 420; Levie *v.* Metropolitan Life Ins. Co., 163 Mass. 117.

[7] Smith *v.* Northwestern Mut. Life Ins. Co., 196 Pa. St. 314.

[8] See Penn. Mut. Life Ins. Co. *v.* Mechanics' Savings Bank & Trust Co., 72 Fed. 413, 429.

[9] Mobile Fire Dept. Ins. Co. *v.* Miller, *supra;* March *v.* Metropolitan Life Ins. Co., 186 Pa. St. 629; Levie *v.* Metropolitan Life Ins. Co., *supra.* See also Penn. Mut. Life Ins. Co. *v.* Mechanics' Savings Bank & Trust Co., 72 Fed. 413, 419; Price *v.* Standard Life & Accident Ins. Co., 90 Minn. 264. *Contra,* Christian *v.* Conn. Mut. Life Ins. Co., 143 Mo. 460. The Missouri statute requires that the fact misrepresented should have contributed to the loss. Mo. Rev. Stat. 1899, § 7890. Also the court held bad a plea that did not allege reliance on the representation. The Ohio statute expressly provides that the policy shall not be voided, unless the misrepresentation induced the issuance of the policy. Oh. Rev. Stat. § 3625; Northwestern Mut. Life Ins. Co. *v.* Risley, 22 Oh. Cir. Ct. Rep. 160.

[10] Acts of 1906, ch. 112, § 28.

[11] Flinn *v.* Headlam, 9 B. & C. 693; Phœnix Life Ins. *v.* Raddin, 120 U. S. 183; Vivar *v.* Supreme Lodge of K. of P., 52 N. J. L. 455.

[12] Valton *v.* National Fund Life Ass. Co., 20 N. Y. 32.

sentations are equally affected. The result is that the statute prescribes a rational limit to those facts which may be made the subject matter of either a warranty or representation that will avoid the policy. Warranties still remain in the nature of conditions precedent, and the issue of reliance thereon is not involved. That this is an important distinction, is evident, when we consider that, where breach of warranty is the defense, there is one less issue of fact to go to a jury always ready to give a verdict unfavorable to the insurance company.[13]

DOUBLE TAXATION OF INHERITANCE OF PERSONALTY. — Through differences in their express terms and different interpretations which the courts have given general terms, state inheritance taxes on personal property are divisible into three distinct classes: (1) those covering all personalty actually within the state,[1] (2) those taxing all personalty, wherever located, of a decedent domiciled in the state,[2] and (3) those including all personalty in the state and such without as belonged to a decedent domiciled therein.[3] An inheritance tax is not a tax on property, but is the price exacted by the state for the privilege it affords in permitting property to be transmitted by will or descent.[4] Thus, clearly, the state where the property is located may tax its succession.[5] The right of the state of domicile to tax has usually been explained on the fiction of *mobilia sequuntur personam*, the same courts inconsistently supporting a tax on personalty without the state on this ground,[6] and one on a foreigner's property within the state on the ground that the property is actually in their control.[7] The only conceivable explanation of the right of the state of domicile to tax the succession of foreign personalty is that, almost universally, it furnishes the law according to which distribution is made.[8]

There is a tendency for states which are wholly unconnected with the succession to impose inheritance taxes. In several states succession to stock in a foreign corporation is taxed if the corporation has property in the state, even though the owner was domiciled elsewhere.[9] The

[13] Scottish Union & Nat. Ins. Co. *v.* Wade, 127 S. W. 1186 (Tex. Civ. App.). A statute required that materiality be submitted to the jury. The jury found that the amount of other insurance was immaterial. *Cf.* March *v.* Metropolitan Life Ins. Co., *supra*, where the court said the materiality of the same fact was too clear to leave to the jury.

[1] See *In re* Weaver's Estate, 110 Ia. 328; *In re* Joyslin's Estate, 56 Atl. 281 (Vt.).

[2] See Gallup's Appeal, 76 Conn. 617.

[3] See Callahan *v.* Woodbridge, 171 Mass. 595, and Frotheringham *v.* Shaw, 175 Mass. 59. These decisions and those *supra* are examples of the different interpretation courts have given the same words, the tax in all these states being on property "within the jurisdiction of the state."

[4] See Magoun *v.* Illinois Trust & Savings Bank, 170 U. S. 283, 288; State *v.* Dalrymple, 70 Md. 294, 299.

[5] Matter of Bronson, 150 N. Y. 1.

[6] See Frotheringham *v.* Shaw, *supra*.

[7] See Callahan *v.* Woodbridge, *supra*.

[8] Lawrence *v.* Kittredge, 21 Conn. 577; Wilkins *v.* Ellett, 108 U. S. 256, 258.

[9] In Vermont the statute expressly taxes all transfers of stock of foreign corporations with their principal place of business in the state. VT. PUB. STAT. (1906), § 876. In a number of states under general statutes such taxes are being claimed, if the corporation has property in the state. See BANCROFT, INHERITANCE TAXES, 19.

legality of such taxes is, as yet, unadjudicated. In a recent case, *In re Cummings' Estate*, 127 N. Y. Supp. 109 (Sup. Ct., App. Div.), a testator left personal property both in New York and California. The California property was administered there according to California law, the court deciding that the testator was domiciled in that state. Later, administration proceedings were instituted in New York, and that court determined that the deceased was domiciled in New York and that the personalty in California was consequently subject to a New York inheritance tax. It is difficult to see what is the basis for the New York tax. To be sure the determination of domicile by one court is not conclusive on another;[10] and where domicile is necessary for jurisdiction a judgment based on an erroneous adjudication of it need not be regarded by a sister state.[11] But in the principal case the domicile is not a jurisdictional fact, there being nothing to prevent a state from distributing property within its borders according to any law it pleases. It is uncontroverted that a distribution based on an erroneous determination of domicile cannot be disregarded in proceedings in another state.[12] Thus the California court has effectively distributed wholly in accordance with its own law, so that the only basis for a tax by the state of domicile — that it has furnished the law of distribution — seems lacking.

Even where personalty is administered according to the law of the testator's domicile the foundation for a tax by the state of the domicile seems rather fanciful. The sovereign of the *situs* has merely chosen to allow property within its jurisdiction to pass according to other principles of distribution than its own, and requires no actual co-operation for such a transfer to be effective. Though a number of states have upheld such taxes,[13] there are opinions which seem adverse to them.[14] While the Supreme Court of the United States has not passed upon the question,[15] it has recently shown itself opposed to double taxation, repudiating the fiction of *mobilia sequuntur personam*,[16] so that it seems not unlikely that it will hold such taxes illegal.

The Theory of Restrictive Agreements as to a Business. — The principle is settled that equity will restrain the breach of an agreement between the grantor and the grantee, restricting the use of land, both by the grantee himself, and by all subsequent purchasers of the land with notice, whether or not an easement or a covenant running with the land is created.[1] But it is not agreed upon what theory this principle

[10] Overby *v.* Gordon, 177 U. S. 214.

[11] Andrews *v.* Andrews, 188 U. S. 14.

[12] Tilt *v.* Kelsey, 207 U. S. 43. See Overby *v.* Gordon, *supra.*

[13] *In re* Merriam, 141 N. Y. 479; Frotheringham *v.* Shaw, *supra.*

[14] See *In re* Joyslin's Estate, *supra;* Albany *v.* Powell, 2 Jones (N. C.) 51.

[15] Blackstone *v.* Miller, 188 U. S. 189, has been referred to as supporting such a tax, and there is a *dictum* (p. 204) to that effect. Yet the decision merely upholds a tax by the state of the *situs* where the state of domicile is also taxing.

[16] Union Transit Co. *v.* Kentucky, 199 U. S. 194, was revolutionary in overthrowing a tax by the state of domicile on foreign personalty, but New York, Central R. *v.* Miller, 202 U. S. 584, supported a tax on personalty periodically without the state but not subject to taxation elsewhere.

[1] Tulk *v.* Moxhay, 2 Ph. 774; Parker *v.* Nightingale, 6 All. (Mass.) 341; Kirkpatrick *v.* Peshine, 24 N. J. Eq. 206.

rests.[2] It has been suggested that this obligation is an analogy in equity either of the doctrine of negative easements,[3] or the doctrine of covenants running with the land. But these analogies are superficial merely, and too narrow to cover the results which the courts actually reach.[4] It must be recognized that this principle, which is purely equitable, a matter of the exclusive jurisdiction of equity, is not confined by any legal analogy, but is based on the broad principle that equity will carry out the intent of the parties. Where the parties by a valid agreement have expressed an intention to impose certain restrictions or servitudes upon the *res*, one who takes with notice of that agreement cannot equitably refuse to carry out that intent. "In such cases, although the covenant or agreement in the deed, regarded as a contract merely, is binding only on the original parties, yet, in order to carry out the plain intent of the parties, it will be construed as creating a right or interest in the nature of an incorporeal hereditament or easement . . . arising out of and attached to the land." [5]

On this theory, the form of the agreement is immaterial. An equitable servitude may be imposed by simple contract,[6] as well as by a covenant.[7] This view also explains the cases where the *res* is other than land. Thus it has been held that these servitudes may attach to personalty.[8] It has also been held that where an agreement has been made for the benefit of a business, the benefit of that covenant will attach to the business, and inure to a subsequent owner of that business.[9] And upon principle it would seem that likewise the burden of a restrictive servitude upon a business should bind a subsequent assignee with notice.[10]

The result in a recent English case, *Wilkes* v. *Spooner*, 24 T. L. R. 157 (Eng., K. B. D., Dec. 16, 1910), may be more logically explained on the above theory. A sold the plaintiff his business of general butcher, covenanting not to establish a rival business within three miles. A

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[2] Jessel, M. R., in London & South Western Ry. Co. *v.* Gomm, 20 Ch. Div. 562, 583, says that the doctrine of Tulk *v.* Moxhay, *supra*, is "either an extension in equity of the doctrine of Spencer's Case to another line of cases or else an extension in equity of the doctrine of negative easements." This statement has been cited in later English cases without a definite choice of either analogy. Rogers *v.* Hosegood, [1900] 2 Ch. 388, 404; *In Re* Nisbet & Pott's Contract, [1905] 1 Ch. 391, 397.

[3] These restrictions are called equitable easements in Peck *v.* Conway, 119 Mass. 546, 549; Trustees of Columbia College *v.* Lynch, 70 N. Y. 440, 446; Joy *v.* St. Louis, 138 U. S. 1, 38, 39. The New York case cited is criticized in DeGray *v.* Monmouth Beach Club House Co., 50 N. J. Eq. 329, 339, where the obligation is founded on the ground of unjust enrichment which is the doctrine advocated by Dean Ames. See 17 HARV. L. REV. 174, 183.

[4] The objections to these analogies are set forth in the article in 17 HARV. L. REV. *supra*.

[5] *Per* Bigelow, C. J., in Whitney *v.* Union Ry. Co., 11 Gray (Mass.) 359, 364.

[6] Tulk *v.* Moxhay, *supra*.

[7] Luker *v.* Dennis, 7 Ch. D. 227; Trustees of Columbia College *v.* Lynch, *supra;* Kirkpatrick *v.* Peshine, *supra*.

[8] Murphy *v.* Christian Press Ass. Publishing Co., 38 N. Y. App. Div. 426. See 13 HARV. L. REV. 53; see New York Bank Note Co. *v.* Hamilton Bank Note Co., 28 N. Y. App. Div. 411, 424. *Contra*, Garst *v.* Hall & Lyon Co., 179 Mass. 588. For an article on Restrictive Covenants as to Patented Articles, see 10 HARV. L. REV. 1.

[9] John Brothers Abergarw Brewery Co. *v.* Holmes, [1900] 1 Ch. 188; Francisco *v.* Smith, 143 N. Y. 488.

[10] *Cf.* Standard American Publishing Co. *v.* Methodist Book Concern, 33 N. Y. App. Div. 409.

conducted a pork business at a nearby shop which he held on lease. This lease A surrendered in order that the defendant, his son, who bought the pork business with notice of this covenant, might get a new lease, and establish a business to rival the plaintiff's. The court enjoined the defendant on the ground that he had taken these premises with notice of the agreement which bound them. The court assumes almost without argument that this burden attached to the land, but it is difficult to see how a mere tenant for years could impose a restriction which would survive his lease. But furthermore it is submitted that this is not a true construction of what the parties intended, upon which, as a basis, this doctrine of equitable servitudes rests.[11] The purchaser of A's business had a much broader intent than merely to impose a servitude on this land. He intended to restrain A's rival business wherever A might attempt to establish it within three miles. A's business was, therefore, the *res* upon which this servitude was imposed. So the defendant, not as the occupant of these premises, but as the assignee of his father's business, is properly enjoined.[12]

RECENT CASES.

ADMIRALTY — TORTS — DAMAGES RECOVERABLE FROM ONE OF TWO VESSELS AT FAULT. — In a collision between vessels A and B in which both were at fault, the cargo on A was damaged. An action was brought, and both vessels were in court. The cargo-owner could probably recover nothing from A. *Held*, that he can recover from B only half of the amount of his damage. *The Drumlanrig*, [1911] A. C. 16.

This decision of the House of Lords affirms that of the Court of Appeal, discussed in 24 HARV. L. REV. 150.

ATTORNEYS — RELATION BETWEEN ATTORNEY AND CLIENT — CONSTRUCTION OF CONTRACT FOR COMPENSATION. — An attorney contracted to prosecute a suit for a contingent fee of one third of the recovery. He sued on a *quantum meruit* for extra services in defending against a counterclaim. *Held*, that these services are within the contract. *Payne* v. *Davis County*, 129 N. W. 823 (Ia.).

Two rules for construing contracts by attorneys for taking cases seem to reconcile all the authorities. First, where the consideration is a contingent fee, the contract is construed to include all legal services necessary to a final and effective recovery. Such a contract includes opposing a petition of *certiorari*, after final judgment. *Tuttle* v. *Claflin*, 88 Fed. 122. And so services in an appeal. *Niagara Fire Ins. Co.* v. *Hart*, 13 Wash. 651. But *cf. In re Bowles*, 12 N. Y. Supp. 468. But services in a separate suit are not held included, even though necessary to the successful completion of the suit which the contract concerns. *Haines and Bishop* v. *Wilson*, 85 S. C. 338. See *Gorrell* v. *Payson*, 170 Ill. 213. Secondly, when the contract is for a fixed fee, it is held not to include unusual, though necessary, services. Such a contract does not include getting a *mandamus* to compel a rehearing. *Isham* v. *Parker*, 3 Wash. 755. Nor does

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[11] See the quotation from Bigelow, C. J., in Whitney *v.* Union Ry. Co., *supra*.

[12] The whole subject of the theoretical basis of the enforcement of these restrictions is very carefully dealt with in 5 HARV. L. REV. 274, and 6 *id.* 280.

it include resisting a motion to vacate a judgment, *Cranmer* v. *Brothers*, 15 S. D. 234. Nor services in an appeal. *Bartholomew* v. *Langsdale*, 35 Ind. 278. Nor even meeting unexpected opposition in a supposedly friendly suit. *Tong* v. *Orr*, 44 Ind. App. 681. But putting in a counterclaim is so usual a proceeding that the principal case would probably have been decided the same way even if the fee had been a fixed amount. *Lindsay* v. *Carpenter*, 90 Ia. 529.

BANKRUPTCY — EXEMPTIONS — RIGHT OF CREDITOR WITH WAIVER OF EXEMPTION. — A bankrupt had given a creditor a waiver of exemption. By amendment of his schedules, the bankrupt withdrew an insufficient claim for exemption. *Held*, that the exempt property is assets of the bankrupt estate. *In re Baughman*, 183 Fed. 668 (Dist. Ct., M. D. Pa.).

A bankrupt has a right to the exemption allowed him by state law, provided he claims it in his schedules or an amendment thereto. BANKRUPTCY ACT OF 1898, §§ 6, 7 a (8); GEN. ORDER XI, 89 Fed. vii; *In re Berman*, 140 Fed. 761. Courts differ as to whether amendment should be allowed when its only effect is to benefit creditors with waivers of exemption. *Moran* v. *King*, 111 Fed. 730; *Goodman* v. *Curtis*, 174 Fed. 644. The question in the present case is whether such a creditor may claim the exemption if the bankrupt does not. The right of a waiver creditor is not a lien on the exempt property. *In re Moore*, 112 Fed. 289. *Cf. In re Meredith*, 144 Fed. 230. The Supreme Court has called it an "equity" which enables the creditor to obtain a stay of the bankrupt's discharge in order that he may proceed in a state court against the property which the bankrupt has claimed as exempt. *Lockwood* v. *Exchange Bank*, 190 U. S. 294. It would seem not an illogical extension of this doctrine to allow the waiver creditor to claim the exemption when the bankrupt fails to do so. But the courts have not done so, even under state laws which, unlike the law of Pennsylvania, allow a waiver as to a particular creditor. *Moran* v. *King*, *supra*. See VA. CODE, 1904, § 3647; *Bowyer's Appeal*, 21 Pa. St. 210.

CONFLICT OF LAWS — REMEDIES: RIGHT OF ACTION — VENUE OF ACTION FOR USE OF LANDS. — The defendant had been adjudged by an Idaho court to be a trespasser on the plaintiff's land there situated, to which he had claimed title. The plaintiff brought an action in Washington to recover the reasonable rental value while the defendant was in possession. A statute permitted a recovery of reasonable rent if the defendant was in possession without the consent of the true owner. *Held*, that this action being transitory may be maintained in Washington. *Sheppard* v. *Coeur d'Alene Lumber Co.*, 112 Pac. 932 (Wash.).

By the overwhelming weight of authority, actions dealing with wrongs to realty, such as trespass, are local. *British South African Co.* v. *Companhia de Moçambique*, [1893] A. C. 602. *Contra*, *Little* v. *Chicago, etc. Ry. Co.*, 65 Minn. 48. But if the action is based on contract it is transitory. *Wey* v. *Yally*, 6 Mod. 194. On this theory, the common-law action of use and occupation may be brought where the defendant is found, for it is based on the implied agreement to pay a reasonable rent for this use which the owner has permitted. *Henwood* v. *Cheeseman*, 3 Serg. & R. (Pa.) 500; *Egler* v. *Marsden*, 5 Taunt. 25. The statute in the principal case permits a recovery if the defendant was in fact in possession even though he claimed title and was defeated in an action of trespass. There is thus no consensual relation from which to create a contract, and it is the plainest fiction to imply an agreement to pay rent when the trespasser denies the other's title. *Jackson & Brothers* v. *Mowry*, 30 Ga. 143. It is essentially a cause of action based on a wrong done to the land, and in the absense of an express declaration by the statute that it is transitory, this departure from the ordinary rule is unjustifiable.

CONFLICT OF LAWS — RIGHTS IN PROPERTY — ATTACHMENT OF PROPERTY BROUGHT INTO STATE WITHOUT CONSENT OF OWNER. — A vessel belonging to A was anchored in American waters. By the procurement of B, a judgment creditor of A, its cable was cut so that it drifted into Canadian waters where B had an attachment levied on it. *Held*, that the attachment should be dissolved. *Houghton* v. *May*, 17 Ont. W. Rep. 750 (High Ct., Dec. 15, 1910). See NOTES, p. 567.

CONSTRUCTIVE TRUSTS — LIABILITY OF INNOCENT PARTIES — PROMISE OF CO-LEGATEE. — A legacy absolute on its face was given to three persons as tenants in common. The testator was induced to do this by the oral promise of one of the legatees to transfer the property to a society. *Held*, that the whole legacy is subject to a trust for the society. *Winder* v. *Scholey*, 83 Oh. St. 63.

Where a devise in joint-tenancy is secured by an oral promise of one devisee, unauthorized by his companions, to give the property to a third person, all the devisees hold in trust for the person designated. *Russell* v. *Jackson*, 10 Hare, 204; *Matter of O'Hara*, 95 N. Y. 403, 413. When such a devise is to tenants in common, only the promisor is so bound. *Tee* v. *Ferris*, 2 Kay & J. 357; *Fairchild* v. *Edson*, 154 N. Y. 199. This difference seems unwarranted. When the promise is made the relation of co-tenancy has not begun, so no supposed peculiar doctrines as to joint-tenancy should be invoked. And in each case the title is thrust into the devisees, so there is the same lack of proof of ratification of the acts of the promisor. Moreover, even though co-tenancy exists at breach, a joint-tenant is no more affected by a contract of, or notice to, his companion than is a tenant in common. *Hanks* v. *Enloe*, 33 Tex. 624. See FREEMAN, COTENANCY, 2 ed., §§ 171, 182. *Contra*, *Freeman* v. *Laing*, [1899] 2 Ch. 355. Unjust enrichment must be the reason for raising the trust in either case, and since a tenant in common profits by the fraud as directly as does a joint-tenant, he, too, should be subject to a trust. *Trustees of Amherst College* v. *Ritch*, 151 N. Y. 282. See 21 HARV. L. REV. 286.

CORPORATIONS — STOCKHOLDERS: INDIVIDUAL LIABILITY TO CORPORATION AND CREDITORS — WAIVER OF LIABILITY. — The defendant took stock in the X company, paying therefor in land, which was accepted at a gross overvaluation. The plaintiff, relying on the representation that the shares had been fully paid for, purchased bonds of the company, each bond containing a waiver of all remedies against the stockholders. The company became insolvent, and this action was brought to recover the balance due on the shares. *Held*, that the defendant is liable, since the waiver was not intended to include any liability for misrepresentation. *Downer* v. *Union Land Co.*, 129 N. W. 777 (Minn.). See NOTES, p. 565.

CRIMINAL LAW — SENTENCE — EFFECT OF IRREGULAR SENTENCE. — After a verdict of guilty in a murder trial, the judge pronounced sentence without the defendant's being asked, according to the statutes, whether he had any legal cause to show why judgment should not be pronounced against him. *Held*, that the case should be remitted for proceedings on the verdict according to the statute. *People* v. *Nesce*, 201 N. Y. 111.

This case overrules a prior decision holding such error ground for a new trial. *Messner* v. *People*, 45 N. Y. 1. The early English practice of not allowing a defendant accused of felony the benefit of counsel may have made this question essential. *Rex* v. *Geary*, 2 Salk. 630. See 1 CHITTY, CRIMINAL LAW, 700. But at present the rights of the accused are so adequately protected that it is a mere form. The decision shows the modern tendency away from the exaggerated desire to protect the accused by taking advantage of any technical error, however harmless. *Cf. Oborn* v. *State*, 143 Wis. 249, 280.

Some courts even say that this omission is not reversible error. *Warner* v. *State*, 56 N. J. L. 686. But where the question is required by statute, the judgment cannot be regular unless that requirement is fulfilled. *People* v. *Walker*, 132 Cal. 137.

CRIMINAL LAW — SENTENCE — EFFECT OF UNAUTHORIZED POSTPONEMENT OF PUNISHMENT. — A sentence of fine and imprisonment was pronounced, with the proviso that if the fines were paid, the imprisonment would be suspended during good behavior. The defendants were released, on payment of the fines. After the term of commitment ordinarily would have expired, they were retaken. *Held*, that the sentence should now be enforced. *State* v. *Abbott*, 70 S. E. 6 (S. C.).

Some courts hold that such a sentence runs from the time it was pronounced, though the defendant has not been imprisoned. *In re Webb*, 89 Wis. 354. Others say that an indefinite postponement of sentence forfeits jurisdiction of the cause. *People ex rel. Boenert* v. *Barrett*, 202 Ill. 287. The view of the principal case, however, seems the sound one, and represents the weight of authority. *Neal* v. *State*, 104 Ga. 509; *State* v. *Cockerham*, 24 N. C. 204. If the sentence is not actually served because the prisoner escapes, he may be reimprisoned after the term would have expired. *Dolan's Case*, 101 Mass. 219. The same is true if the sheriff wrongfully delays punishment. *Miller* v. *Evans*, 115 Ia. 101. That the judge is the one at fault should not alter the case. *Ex parte Collins*, 6 Cal. App. 803.

CROPS — RIGHT TO MATURED BUT UNSEVERED CROP AT TERMINATION OF LEASE. — The defendant gave the plaintiff a lease for one year of some land upon which the plaintiff raised a cotton crop. At the end of the term, part of the crop stood matured, but unpicked in the field. This the plaintiff picked, but the defendant held it as his own. The plaintiff brought replevin. *Held*, that he may recover. *Opperman* v. *Littlejohn*, 54 So. 77 (Miss.).

A tenant for an uncertain time may return after the end of his term to gather the crops, sown during the continuance of his lease. See *Brown* v. *Thurston*, 56 Me. 126. Usually, however, a tenant for a fixed term has no right to harvest crops after his term has expired. *Sanders* v. *Ellington*, 77 N. C. 255. In some states custom is allowed to change this and give the tenant the right to take the "waygoing" crop. *Van Doren* v. *Everitt*, 5 N. J. L. *460. But a case in Virginia expressly decides that, as there can be no immemorial customs in this country, the common law cannot be altered in this respect by the custom of the district. *Harris* v. *Carson*, 7 Leigh (Va.) 632. A few jurisdictions regard matured crops, though still uncut, as personalty. *Hecht* v. *Dettman*, 56 Ia. 679. *Contra*, *Tripp* v. *Hasceig*, 20 Mich. 254. See TIFFANY, LANDLORD & TENANT, 1644. And it has been held that even a tenant for a fixed term may return within a reasonable time after the end of his lease to remove his personalty. *Smith* v. *Boyle*, 66 Neb. 823. See TIFFANY, LANDLORD & TENANT, 1672. It would seem, therefore, that there is some authority to support the decision in the principal case. *Cf. Meffert* v. *Dyer*, 107 Mo. App. 462.

DAMAGES — CONSEQUENTIAL DAMAGES — LOSS OF OPPORTUNITY TO COMPETE FOR EMPLOYMENT. — The defendant contracted to choose, from fifty women who should be selected by the readers of a newspaper, twelve to be members of his theatrical company. He failed to give notice to the plaintiff, who was one of the fifty, so that she might present herself for the final selection. *Held*, that the plaintiff's recovery is not limited to nominal damages. *Chaplin* v. *Hicks*, 27 T. L. Rep. 244 (Eng., K. B. Div., Feb. 8, 1911).

The rule requiring that damages be certain usually defeats recovery for loss of a mere chance of gain. *Johnson* v. *Western Union Tel. Co.*, 79 Miss. 58.

Thus a plaintiff prevented from applying for employment is not allowed to recover damages for loss of that opportunity. *Brown* v. *Cummings*, 7 Allen (Mass.) 507. The chance of promotion cannot be considered. *Richmond & Danville R. Co.* v. *Elliott*, 149 U. S. 266. The estimated winnings of a race horse are no element of damages. *Western Union Tel. Co.* v. *Crall*, 39 Kan. 580. The loss of a possible contract is too uncertain to be matter for compensation. *Beatty Lumber Co.* v. *Western Union Tel. Co.*, 52 W. Va. 410. The English cases, however, are more liberal in allowing recovery for uncertain damage. *Jacques* v. *Millar*, 6 Ch. D. 153; *Simpson* v. *London & North Western Ry. Co.*, 1 Q. B. D. 274. Recovery is denied in the American cases not because of remoteness; for the loss of opportunity to compete is an immediate consequence of the breach, reasonably within the contemplation of the parties when the contract was made. See *Adams Express Co.* v. *Egbert*, 36 Pa. St. 360. But see MAYNE, DAMAGES, 7 ed., 63. Nor is mere difficulty of ascertaining the amount, if damages certainly have accrued, a bar to recovery. *Wakeham* v. *Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205. But the plaintiff seeking substantial damages must show that he has actually been damaged. This burden he does not sustain by showing that he may have been damaged. *Adams Express Co.* v. *Egbert*, *supra*. But proof of a reasonable certainty of success in the competition gives the right to substantial damages. *Texas & Western Tel. & Tel. Co.* v. *Mackenzie*, 81 S. W. 581 (Tex.).

INSURANCE — CONSTRUCTION AND OPERATION OF CONDITIONS — IMMEDIATE NOTICE OF LOSS. — The plaintiff was insured under a fire policy requiring him to give "immediate" notice of loss. He obtained knowledge of the loss one month, and sent notice two months, after the fire. The insurer knew of the fire as soon as the insured. *Held*, that the plaintiff may recover. *Will & Baumer Co.* v. *Rochester German Ins. Co.*, 140 N. Y. App. Div. 691.

A requirement of "immediate" notice in an insurance policy means notice within a reasonable time. *Solomon* v. *Continental Fire Ins. Co.*, 160 N. Y. 595. The word was rightly given this construction in order to make performance of the condition practicable. See *Edwards* v. *Baltimore Fire Ins. Co.*, 3 Gill (Md.) 176, 187. Notice was not given within a reasonable time in the principal case. *Burnham* v. *Royal Ins. Co.*, 75 Mo. App. 394; *Lake Geneva Ice Co.* v. *Selvage*, 36 N. Y. Misc. 212. Its result might be supported if the insurer's knowledge were relevant on the issue of the reasonableness of the time for giving notice. But it is not; for the criterion of a reasonable time for notification is the due diligence of the insured in getting and giving notice. *Niagara Fire Ins. Co.* v. *Scammon*, 100 Ill. 644. See *Ætna Life Ins. Co.* v. *Bethel*, 131 S. W. 523, 526 (Ky.). It may be urged that the purpose of the condition is accomplished when the insurer knows of the loss within the time set for notice from the insured. See *Ins. Co. of North America* v. *Brim*, 111 Ind. 281, 286. But such knowledge does not take the place of performance of the express condition. *Patrick* v. *Farmers' Ins. Co.*, 43 N. H. 621. But see *Omaha Fire Ins. Co.* v. *Dierks*, 43 Neb. 473, 482. The doctrine that conditions should be construed favorably to the insured does not sanction disregarding them entirely.

INSURANCE — CONSTRUCTION AND OPERATION OF CONDITIONS — WARRANTIES: STATUTORY RESTRICTIONS. — In an application for insurance, the applicant stated that the beneficiary was his wife, whereas she was really his mistress. This answer was made a warranty by the terms of the policy. A statute provided that all statements should be regarded as representations and should not void the policy unless material or fraudulently made. *Held*, that there can be no recovery, as the fact misrepresented is clearly material, and hence the statute does not apply. *Continental Casualty Co.* v. *Lindsay*, 69 S. E. 344 (Va.). See NOTES, p. 571.

INSURANCE — GUARANTY INSURANCE — NATURE OF CONTRACT: RELATION TO CONTRACT OF SURETYSHIP. — The defendant company executed a bond guaranteeing the faithful performance of a building contract. The terms of the contract provided that no extra work should be done, except by written order of the owner or architect. During the progress of construction, extras to a large amount were ordered orally. *Held*, that the unauthorized ordering of extras does not discharge the guarantor. *Hormel & Co.* v. *American Bonding Co.*, 128 N. W. 12 (Minn.). See NOTES, p. 568.

INTERSTATE COMMERCE — CONTROL BY STATES — DUTY OF RAILROADS TO FURNISH CARS ON REQUEST. — A federal statute put a general duty on railroads to furnish cars to a shipper upon reasonable request. A state statute specified the manner of the request and penalized the railroad at two dollars per day per car for delay. *Held*, that the state statute is a proper exercise of the police power, and that it does not interfere with the federal right to regulate interstate commerce. *Martin* v. *Oregon R. & Navigation Co.*, 113 Pac. 16 (Or.).

The states can undoubtedly, under their police power, make regulations which may affect interstate commerce, but the line between such regulations and unconstitutional interference is a very thin one. See COOLEY, CONST. LIM., 7 ed., 856. The right of a state to prohibit the importation of cattle from certain districts during specified months has been denied. *Railroad Co.* v. *Husen*, 95 U. S. 465. But the right to keep out cattle from those same districts unless certificates of the state authorities as to their condition are produced, there being no inconsistency with federal regulations, has been supported. *Reid* v. *Colorado*, 187 U. S. 137. A statute very like that in the principal case was said to transcend the state's police power and to impose an unconstitutional burden on interstate commerce because it allowed nothing to excuse the railroad for not furnishing the cars except "strikes or other public calamity." *Houston & Tex. Cent. R. Co.* v. *Mayes*, 201 U. S. 321. In all these cases the state statutes were really amplifications of the broader and more general terms of federal statutes covering the same ground. The exact limits of lawful legislation on this subject cannot be defined. The test of each statute must be its reasonableness. See *Houston & Tex. Cent. R. Co.* v. *Mayes*, 201 U. S. 321, 328.

INTERSTATE COMMERCE — INTERSTATE COMMERCE COMMISSION — REASONABLE RATES. — The Interstate Commerce Commission declared that an advanced rate on lumber between certain points was unreasonable because the long established lower rate had induced the growth of a large lumber industry, the profits of which would be destroyed by the advance. *Held*, that the commission has no power to declare the rate unreasonable on such a ground. *Southern Pacific Co. and Oregon & California R. Co.* v. *Interstate Commerce Commission*, 31 Sup. Ct. Rep. 288.

The commission left unconsidered the reasonableness of the new rate *per se*, and forbade the advance solely on the ground of injustice to capital invested upon the faith of the old rate. The commission itself has denied that hardship on the shipper is sufficient, alone, to make a rate unreasonable. *Oregon & Washington Lumber Mfrs. Ass'n* v. *Union Pacific R. Co.*, 14 Interst. C. Rep. 1, 14. But *cf. New Albany Furniture Co.* v. *M. J. & K. C. R. Co.*, 13 Interst. C. Rep. 594. And the federal courts have held that the commission has no power to rest the propriety of certain rates upon their effect in equalizing the advantages between various manufacturing zones. *Chicago, R. I. & P. Ry. Co.* v. *Interstate Commerce Commission*, 171 Fed. 680. The Supreme Court reversed this case, but its decision was based on the ground that the commission had in fact found the advanced rate unreasonable *per se*, and

that no such power as the lower court rightly disapproved had been assumed. *Interstate Commerce Commission* v. *Chicago, R. I. & P. Ry. Co.*, 218 U. S. 88. Any other decision in the principal case would leave the railroads powerless to raise any rate that had been established long enough to induce the investment of capital upon the faith of it.

LIFE ESTATES — FUTURE INTERESTS IN CHATTELS PERSONAL. — Pictures were bequeathed to trustees upon trust to allow them to be used and enjoyed by A for life, B in tail male. B mortgaged his interest, A living. *Held*, that B's interest was a chose in action only; hence the mortgage was not registrable under the Bills of Sale Acts. *In re Thynne*, [1911] 1 Ch. 282.

This follows a similar previous decision. *In re Tritton*, 6 Morr. Bankr. Cas. 250. See 22 HARV. L. REV. 441. In that case Wills, J., said that the legatee for life had the property in the pictures and that the future interest was an executory bequest. If this were so, a chattel personal bequeathed to A for life would pass to his executor, for A would have the absolute title subject to no executory gift over. The only cases on the point are American; all, except in Delaware, return the chattel to the donor. *Black* v. *Ray*, 1 Dev. & B. (N. C.) 334. See 19 HARV. L. REV. 219. Likewise a bequest to A, a bachelor, for life, then to A's eldest son for life, then to A's second son, would be, as to the second son, too remote if his interest were executory. The cases hold it good. *Evans* v. *Walker*, 3 Ch. D. 211; *Seaver* v. *Fitzgerald*, 141 Mass. 401. Finally, the earlier English decisions upon bequests of chattels personal to A for life and then to B give A the use only and B the property. *Vachel* v. *Vachel*, 1 Ch. Cas. 129; *Hyde* v. *Parrat*, 1 P. Wms. 1. See 2 BL. COMM. 398. Clearly A has only the use and occupation and stands as a bailee for life, while B takes a vested interest in the nature of a remainder. See GRAY, RULE AGAINST PERPETUITIES, 2 ed., §§ 71–98, 789–856; 14 HARV. L. REV. 397. The error of Wills, J., has been shown to arise from overlooking the fact that the artificial presumption that a life estate is longer than a term for years (and that therefore a devise of a term for years to A for life carries the whole term) is not applicable to chattels personal, which may be bailed and the use and occupation of which may be given for life. There is no presumption that a picture will not endure beyond the life of its bailee. See GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 832.

MINES AND MINERALS — EFFECT ON DISSEISOR'S ADVERSE POSSESSION OF SEVERANCE OF MINERAL ESTATE BY DISSEISOR. — The defendant was dispossessed of land by A, who before the Statute of Limitations had run sold all the minerals under said land to the plaintiff by a warranty deed. The plaintiff did not enter, but A continued in possession of the surface of the land beyond the statutory period, and then died. The plaintiff entered into actual possession of the mineral estate and, upon discovering the defendant's claim to an interest therein, brought a bill in equity to quiet title. *Held*, that the plaintiff is entitled to this relief. *Black Warrior Coal Co.* v. *West*, 54 So. 200 (Ala.).

The conveyance of the coal in a piece of land creates in the purchaser an estate in land. *Caldwell* v. *Fulton*, 31 Pa. St. 475. By such a conveyance, a severance is effected between the mineral estate and the surface. See *Caldwell* v. *Copeland*, 37 Pa. St. 427, 430. And it has been held that there may be a severance even by mining by the owner of the freehold. *Delaware & Hudson Canal Co.* v. *Hughes*, 183 Pa. St. 66. See 11 HARV. L. REV. 417. Adverse possession of the surface, begun after a severance of the two estates, does not affect the title to the estate in the minerals. *Plummer* v. *Hillside Coal & Iron Co.*, 160 Pa. St. 483. In the principal case, the defendant contends that A's deed to the plaintiff worked a severance of the minerals from the surface, so that A's possession of the surface no longer affected the title to the coal, and as the plaintiff did not actually enter under the deed, no title to the coal ac-

crued by lapse of time. But the court rightly decides that by his deed A does not abandon possession of the minerals, rather he continues to assert his right therein for his grantee. And a recent Tennessee case reaches the same conclusion. *McBurney* v. *Glenmary Coal & Coke Co.*, 121 Tenn. 275.

PATENTS — INFRINGEMENT: RIGHT TO ACCOUNTING OF PROFITS IN EQUITY. — The plaintiff filed a bill for infringement of a patent, averring that he had never manufactured or sold the patented article, nor sustained actual damage from the use of his invention by others, and praying for an injunction, and accounting of profits. By the rules of the court the cause could not be heard until a time when the patent would have expired, and hence an injunction could not be obtained. The defendant demurred. *Held*, that the demurrer should be overruled. *Tompkins* v. *International Paper Co.*, 183 Fed. 773 (C. C. A., Second Circ.).

The owner of a patent should be so secured against infringement of his right that not only should he not lose but the infringer should not gain by his own wrong. See WALKER, PATENTS, 3 ed., § 420. Equity furnishes this security by compelling the infringer to account for profits. But a bill for a bare accounting of profits will not be sustained in equity; there must be an independent ground of equitable jurisdiction, *e. g.*, the right to an injunction. *Root* v. *Railway Co.*, 105 U. S. 189. The remedy at law, however, often fails to afford proper protection, for the infringer's profits may exceed the inventor's damages. Recognizing this, a statute allows the court to impose treble damages. U. S. COMP. ST., 1901, § 4919. But in the principal case, the damages are nominal, and treble damages would not equal profits. It would seem that the plaintiff might waive the tort and sue in assumpsit. See *Sayles* v. *Richmond, Fredericksburg & Potomac R. Co.*, 4 Ban. & A. (U. S.) 239; *Steam Stone Cutters Co.* v. *Sheldons*, 15 Fed. 608. But as the right to this action is not clearly established, the principal case is to be supported on the ground that equitable jurisdiction arises from lack of an adequate remedy at law. See *Root* v. *Railway Co.*, 105 U. S. 189, 216.

PUBLIC OFFICERS — RIGHT OF RETIRING CITY OFFICIAL TO REMOVE INDEX INSTALLED BY HIM. — A city treasurer, whose duty it was to keep voluminous assessment records, installed an improved card index system at his own expense. This he was not required by law to do. His successor applied for an injunction restraining him from removing the index. *Held*, that the injunction should be granted. *Robison* v. *Fishback*, 93 N. E. 666 (Ind.).

The holding that the index became public property under the circumstances and hence could not be removed is clearly right. *Herron* v. *McEnery*, 1 McGloin (La.) 108. The index seems properly a part of the public records. See *Herron* v. *McEnery*, *supra*. But *cf. Bishop* v. *Schneider*, 46 Mo. 472. Even if the index is not strictly part of the public records, the public interest requires that it should not be removed, since it is indispensable in the use of the records. *Cf. Commissioners of Tippecanoe County* v. *Mitchell*, 131 Ind. 370. Indeed, the cases go further than to hold that the property right has vested in the public, and deny the retiring official any compensation. He has no contract for breach of which he may recover. For compensation as a public officer, he is entirely dependent on statutory provision. *Rasmusson* v. *County of Clay*, 41 Minn. 283; *Towsley* v. *Ozaukee County*, 60 Wis. 251. Public officers are deemed to have accepted their offices *cum onere*. If the installing of the index is incidental to his official duties, he is fully paid by his salary. *Gilchrist* v. *City of Wilkes-Barre*, 142 Pa. St. 114. If it is not, he must be treated as a volunteer, not entitled to recover in quasi-contract. *Rowe* v. *County of Kern*, 72 Cal. 353.

QUASI-CONTRACTS — MONEY PAID TO USE OF DEFENDANT — RECOVERY FOR PERFORMANCE OF DEFENDANT'S CONTRACTUAL DUTY. — The defendant

contracted to support a relative. On his failure to do so, the plaintiff cared for her while she was ill. *Held*, that he cannot recover from the defendant for his services. *Matheny* v. *Chester*, 133 S. W. 754 (Ky.).

The court denied recovery on the ground that the plaintiff was in no way affected by the defendant's contract. But it entirely overlooks the possibility of a quasi-contractual right arising from the benefit conferred by the discharge of the defendant's obligation. *Exall* v. *Partridge*, 8 T. R. 308. To establish this it must be shown that the plaintiff did not act officiously. *Dunbar* v. *Williams*, 10 Johns. (N. Y.) 249. He must act under some necessity, such as to preserve his property or discharge his debt. *Johnson* v. *Royal Mail Steam Packet Co.*, L. R. 3 C. P. 38. Even fulfilling a strong moral duty, such as supporting those in need or rendering funeral services, is enough. *Gilley* v. *Gilley*, 79 Me. 292; *Patterson* v. *Patterson*, 59 N. Y. 574. The plaintiff, moreover, must expect recompense. See KEENER, QUASI-CONTRACTS, 350. In the principal case the illness of the defendant's relative furnishes, on the authorities, sufficient necessity. The result of the decision may be right if the evidence showed that no recompense was expected, but the court's reasoning seems indefensible, since one not a party to the defendant's contract to support may be allowed recovery in quasi-contract. *Forsyth* v. *Ganson*, 5 Wend. (N. Y.) 558; *Rundell* v. *Bentley*, 53 Hun (N. Y.) 272. The decision leads to a circuity of action, since the plaintiff may recover from the defendant's relative, who may in turn sue the defendant.

RESTRAINTS ON ALIENATION — CONDITION AGAINST ALIENATION QUALIFIED AS TO PERSONS. — The testatrix devised property in fee to children and grandchildren on condition that if any of them "shall voluntarily or involuntarily alienate or devise the portion set apart for them other than to some descendant of mine (except for life to the wife or husband of some descendant of mine while such descendant may be living) and without the consent of all my descendants who shall at the time be capable of conveying real property," then over to the other descendants. *Held*, that the conditional limitation over is void. *Manierre* v. *Welling*, 78 Atl. 507 (R. I.).

It is now well settled that a condition or conditional limitation restraining an owner in fee simple from selling his land is bad. *Potter* v. *Couch*, 141 U. S. 296. And the same result follows when the restriction is against alienation within a limited time. *Mandlebaum* v. *McDonell*, 29 Mich. 78. Where the restraint is one qualified as to persons, the authorities are in hopeless confusion and no settled rule has been evolved. See GRAY, RESTRAINTS ON ALIENATION, 2 ed., §§ 31–45. One test adopted in determining the validity of such clauses is "whether the condition takes away the whole power of alienation substantially." *In re Macleay*, L. R. 20 Eq. 186, 189. But its correctness has been doubted in a later decision. *In re Rosher*, 26 Ch. D. 801, 816. It is frequently said that a condition not to alienate to particular persons is good. See *Winsor* v. *Mills*, 157 Mass. 362, 364. And this would seem to be correct, since the removal of these persons from the number of possible transferees effects practically no restraint on alienation. It is submitted as the correct rule that any condition against alienation is bad if alienation is restricted to particular individuals or a particular class, and hence the court in the main case properly held the restraint invalid.

RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO THE USE OF PROPERTY — RESTRICTION ON USE OF LEASEHOLD PREMISES CONTINUING AFTER SURRENDER. — A had leasehold interests in two neighboring shops, in one of which he carried on the trade of a pork butcher, and in the other that of a general butcher. A sold his lease and business in the latter to the plaintiff, covenanting not to engage in the trade of general butcher within three miles. The defendant, who had notice of this covenant, decided to buy A's business; so A surrendered his lease in the first shop. The defendant took out a new lease of the

premises and there carried on the business of general butcher, from continuing which the plaintiff sought to enjoin him. *Held*, that the defendant be enjoined. *Wilkes* v. *Spooner*, 27 T. L. R. 157 (Eng., K. B. D., Dec. 16, 1910). See NOTES, p. 574.

RULE AGAINST PERPETUITIES — POWERS — VALIDITY OF POWER WHEN AN APPOINTMENT UNDER IT OF A TRANSMISSIBLE INTEREST WOULD BE TOO REMOTE. — A testator left personalty in trust for A for life, then for A's husband for life, and after the decease of A and of any husband with whom she might intermarry having any issue of A, for such of A's issue as A should by deed or will appoint, and in default of appointment for A's children then living. After A's first husband had died, A made an absolute appointment by deed to her children. *Held*, that this appointment is void for remoteness. *Re Norton*, 103 L. T. Rep. 821 (Eng., Ch. D., Dec. 20, 1910).

A power of appointment given to a living person will generally be good, since it must be exercised in the donee's lifetime. Yet a power to appoint to a class, which may not be ascertained until a period too remote, is bad, for the appointment cannot take effect within the required limits. In the principal case, however, as the objects of the power are the issue of A, the class is not too remote. Yet an appointment of a transmissible interest to any member of the class is necessarily bad; for, reading it into the instrument creating the power, it is a gift which may not vest until the death of a husband of A who was not in being at the testator's death. *Bristow* v. *Boothby*, 2 Sim. & St. 465. It has therefore been suggested that such a power is void. GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 476 a. It would seem, however, to be correctly pointed out in the principal case that the power itself is valid if a lesser interest can be appointed which if read into the original instrument would not have been too remote. An appointment of life estates to issue of A living at the death of the testator would thus be good. But although the class is not too remote, the *dictum* of the court that such an appointment might be made to children of A born after the testator's death seems wrong; for though such interests must vest, if at all, during the lives of the appointees, their vesting might still be too remote from the testator's death.

TAXATION — PARTICULAR FORMS OF TAXATION — FEDERAL TAX ON CORPORATIONS MEASURED BY INCOME. — A federal statute imposed on every corporation organized in, or doing business in, any state of the United States, a special excise tax, with respect to doing business, equivalent to one *per centum* upon its entire net income over and above $5000. *Held*, that the statute is constitutional. *Flint* v. *Stone Tracy Co.*, U. S. Sup. Ct., March 13, 1911. See NOTES, p. 563.

TAXATION — PARTICULAR FORMS OF TAXATION — SUCCESSION TAX WHEN PROPERTY PASSES IN DEFAULT OF APPOINTMENT. — A Massachusetts statute provides that when a person possessing a power of appointment has failed to exercise it, a disposition of property shall be deemed to take place in the same manner as if the person becoming entitled to the property had succeeded thereto by a will of the donee of the power. Before this statute property had been conveyed to trustees to pay the income to A for life and on her death to convey to her appointee by will; in default of such will, to A's heirs at law in fee. A died without exercising the power. A's heirs questioned the constitutionality of the succession tax. *Held*, that the tax is constitutional. *Minot* v. *Stevens*, 93 N. E. 973 (Mass.).

The case is to be supported on the ground that Massachusetts law performs a service on A's death by designating A's heirs at law, and permitting the vesting of the contingent remainder in them as such. The language of the opinion, however, is far broader and asserts the validity of the enactment where the persons entitled in default of appointment hold vested interests.

New York has held such a statute unconstitutional. For a discussion of the principles involved, see 19 HARV. L. REV. 121.

TAXATION — WHERE PROPERTY MAY BE TAXED — BANK DEPOSITS OF NON-RESIDENTS. — A statute provided that every interest-bearing deposit in a national bank in the state should pay a certain tax. Some of the credits were the property of non-residents. *Held*, that these credits are beyond the taxing power of the state. *State* v. *Clement National Bank*, 78 Atl. 944 (Vt.).

It has been frequently held that bank deposits of non-residents are taxable where the bank is situated. Some of these decisions are based on the fact that money subject to call represents wealth as truly as if kept *in specie*. *Matter of Houdayer*, 150 N. Y. 37. The same result, however, was reached when notice of withdrawal of funds was necessary. *Blackstone* v. *Miller*, 188 U. S. 189. The ground of other decisions is that the debt is incident to a business there carried on, and this reasoning is not confined to bank deposits. *Bluefields Banana Co.* v. *Board of Assessors*, 49 La. Ann. 43; *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395. Moreover, the Supreme Court has broadly asserted that power over the person of the debtor confers taxing power over the debt, not from any theory as to the *situs* of the debt but because that jurisdiction is depended upon to enforce the right. *Blackstone* v. *Miller*, *supra*. This doctrine has been applied to demand loans to stockbrokers, but is scarcely applicable to deposits only temporarily in the state. *Matter of Daly*, 100 N. Y. App. Div. 373. See *Orleans Parish* v. *New York Life Ins. Co.*, 216 U. S. 517, 523. The principal case, though against the present weight of authority, follows an old *dictum* of the United States Supreme Court. See *State Tax on Foreign-held Bonds*, 15 Wall. (U. S.) 300. See also 15 HARV. L. REV. 680; 20 HARV. L. REV. 656.

TAXATION — WHERE PROPERTY MAY BE TAXED — SUCCESSION TAX ON FOREIGN PERSONALTY. — A testator left personal property in New York and California. The California court administered the California property according to that law, holding that the testator was domiciled there. Later, administration proceedings were instituted in New York when it was determined that the testator was domiciled there. *Held*, that the California personalty is subject to a New York inheritance tax. *In re Cummings' Estate*, 127 N. Y. Supp. 109 (Sup. Ct., App. Div.). See NOTES, p. 573.

WATERS AND WATERCOURSES — NATURAL WATERCOURSES: RIPARIAN RIGHTS — RIGHT OF ACCESS TO WHARF ON TIDAL RIVER. — The defendant's wharf, extending out to deep water in a tidal river, was erected solely on land granted to the defendant in fee by the state. The arms of a drawbridge belonging to the plaintiff railroad could not be swung open when any vessel lay alongside the defendant's wharf. The plaintiff sought to enjoin the defendant from thus interfering with the opening and closing of the drawbridge. *Held*, that the injunction be denied. *Northern Pac. Ry. Co.* v. *Slade Lumber Co.*, 112 Pac. 240 (Wash.).

In Washington a riparian owner has no right of access to navigable water. *Eisenbach* v. *Hatfield*, 2 Wash. 236. This is against the weight of authority. *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662; *Yates* v. *Milwaukee*, 10 Wall. (U. S.) 497. But see *Stevens* v. *Paterson & Newark R. Co.*, 34 N. J. L. 532. The reasoning is that, since the state has title to the tide lands, an abutting upland owner has no greater rights over those lands than over any other land. *Bowlby* v. *Shively*, 22 Or. 410. See 1 WOOD, NUISANCES, 3 ed., § 468. But the state has not such an unqualified ownership. See 1 LEWIS, EMINENT DOMAIN, 3 ed., § 95. For the fact that another has title to the tide lands does not destroy the right of access over them, or even a right of wharfing out. *Mobile Transportation Co.* v. *City of Mobile*, 153 Ala. 409. An abutting owner's right of access to a street owned in fee by the city affords an analogy. *Kane* v. *New York Ele-*

vated R. Co., 125 N. Y. 164. Access is subject to the public right to make improvements for navigation. *Home for Aged Women* v. *Commonwealth*, 202 Mass. 422. Unless the rule that there is no right of access is limited by the principal case, it is hard to see how the wharf-owner under the Washington theory is much better off than when he owned only the upland. His land and wharf still abut on land to which the state has title.

WITNESSES — PRIVILEGE AGAINST SELF-INCRIMINATION — APPLICATION TO COMPULSORY STATEMENTS OUT OF COURT. — The defendant was indicted under a statute providing that an operator of an automobile, who does damage to persons or property, must report to a police officer his name, address, and license number, and the fact of the injury. The New York Constitution provides that no one shall "be compelled in any criminal case to be a witness against himself." *Held*, that the statute is unconstitutional. *People* v. *Rosenheimer*, 44 N. Y. L. J. 1629 (Ct. Gen. Sess., N. Y. County, Jan. 1911). See NOTES. p. 570.

WITNESSES — PRIVILEGE AGAINST SELF-INCRIMINATION — RIGHT OF WITNESS TO REFUSE ATTENDANCE. — A commissioner was appointed to investigate charges against a borough president. On investigating the same charges the grand jury returned an indictment against the petitioner, who was later subpœnaed to appear before the commissioner to testify respecting the same matters as those charged in the indictment. *Held*, that a motion to vacate the *subpœna* should be granted. *Matter of Phillips*, 70 N. Y. Misc. 8 (Sup. Ct.).

A witness is not ordinarily exempt from being sworn, because incriminating questions are likely to be asked him. *Eckstein's Petition*, 148 Pa. St. 509. But it is useless to make him attend when he may refuse, by reason of his privilege, to disclose any of the matters for which he was called. It would, furthermore, expose him to a needless inference because of his refusal to testify from the stand. If, therefore, his examination is to relate solely to matters tending to incriminate, an order requiring his appearance will be vacated. *Matter of Attorney-General*, 21 N. Y. Misc. 101. But if the court is to grant this order it must be certain that every material question to be asked is within the privilege. *Skinner* v. *Steele*, 88 Hun (N. Y.) 307. The granting or refusal of the order should be at the discretion of the court.

BOOK REVIEWS.

THE CONSTITUTIONAL LAW OF THE UNITED STATES. By Westel Woodbury Willoughby. New York: Baker, Voorhis and Company. 1910. In two volumes. pp. lxxxv, xxx, 1390.

This work is based upon lectures delivered to graduate students in political science at Johns Hopkins University. As it was not prepared for the purely technical purposes of lawyers, it adds to the ordinary topics many which have heretofore had too scanty treatment, for example, "the maintenance of federal authority by *habeas corpus* to state authorities," "the federal control of the form of state government," "full faith and credit clause," "the comity clause," "compacts between the states and between the United States and the states," "expatriation," "the legal status of Indians," "the power of the United States to acquire territory," "the extent of the power of Congress to govern the territories," "military and presidential government of acquired territory," "the distinction between incorporated and unincorporated territories," "citizenship in the territories," "international agreements which do not require the approval of the Senate," "the process of legislation as constitutionally determined," "political questions," "the suability of states," "impeachment,"

"presidential succession," "the powers and duties of the President," "the appointment and removal of officers," "military law," "martial law," "the separation of powers," "conclusiveness of administrative determinations," and "the delegation of legislative power." The discussion of such comparatively untouched subjects causes the work to supplement in a very useful way the earlier books on the same general subject. Yet it should not be inferred that there is any neglect to deal with the more common topics, such as "the supremacy of the Constitution," "principles of constitutional construction," "the division of powers between the United States and its member states," "the Fourteenth Amendment," "federal powers of taxation," "interstate and foreign commerce," and "the obligation of contracts." The whole ground is covered, in fact; and apparently it is covered with good judgment as to the relative space to be assigned to the topics in such a general treatise. The time has come when any one wishing minute knowledge as to taxation, interstate commerce, and the like, must go to special treatises or to the digests, and in recognizing this fact the author has consulted the interests both of lawyers and of the students for whose use the work was primarily intended.

A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES. By Jairus Ware Perry. Sixth Edition, by Edwin A. Howes, Jr. In two volumes. Boston: Little, Brown and Company. 1911. pp. clxvii, 1642.

Of the American treatises on the subject of trusts, that by Perry is undoubtedly the most extensively used by lawyers and the most frequently cited by the courts. In the sixth edition, which has just appeared, the editor has brought the authorities down to date, citing about twenty-seven hundred new cases as well as the recently enacted or revised statutes of England and the several states relating to the subject. He has also rewritten the footnotes which were inserted in the fifth edition, which appeared a dozen years ago, and he has added many new notes. In the sixth as in the fifth edition practically no changes have been made in the text. The result is that the footnotes, though sometimes merely amplifying or explaining the text, are often contradictory to it. This method of treatment is rather unsatisfactory. Though there are parts of Perry's treatise which are admirable and which might be called classic, which perhaps deserve to survive unchanged by the hand of the reviser, yet there are also passages which are vague or inaccurate and which it would seem might better have been rewritten.

The footnotes added by the editor of the present edition are for the most part clear and convincing and add considerably to the value of the book. Particularly good are those dealing with matters relating to deposits in savings banks in the name of the depositor as trustee for another (p. 84), and with the right of the *cestui que trust* to follow the trust *res* into its product (p. 1359).

Among the other matters treated at some length in the new footnotes are the questions of voluntary settlements in trust (p. 110); trusts created by precatory words (p. 149); duties owing to the *cestui que trust* by a depositary of trust funds (p. 177); bequests intended to be on trust but as to which no trust is declared in the will (p. 246); constructive trusts in cases where a deed or devise is procured by fraud or by a promise which is subsequently broken (p. 289); purchase of the trust *res* by the trustee (p. 316); purchase of land in his own behalf by one who has orally agreed to purchase for another (p. 346); the doctrine of *lis pendens* (p. 371); non-exclusive powers and illusory appointments (p. 436); the extent of the estate taken by a trustee (p. 532); restraints upon alienation (p. 628); the liability of a trustee to the *cestui que trust* for acts of co-trustees (p. 667), for misuse of trust funds (p. 690), and for acts of agents (p. 711); the liability of a trustee to third persons

in tort and in contract (p. 700); equitable conversion (p. 717); the power of a trustee to use income and principal to pay for repairs (p. 784); the respective rights of a beneficiary for life and of the remainderman as to stock and cash dividends (pp. 874, 882, 885) and as to bonds (p. 896), and where the testator has expressly or impliedly directed a conversion of the trust estate (p. 900) and where repairs or improvements are made (p. 911); charitable uses (pp. 1155, 1170, 1203) and the doctrine of *cy près* (pp. 1186, 1197); the duties of a purchaser from a trustee (p. 1312); the rights of creditors of a trustee (p. 1337); the doctrine of laches (p. 1418); and the circumstances under which the *cestui que trust* should be a party to suits involving the trust *res* (p. 1430).

Some matters are not so fully or adequately treated, such as the question as to when the *cestui que trust* has direct rights against third parties and when he has to work out his rights through his trustee, a matter vital to the proper determination of the question as to when the *cestui que trust* is barred by the trustee's laches, and of the question of joinder of parties. So too the discussion of the rights of a *bonâ fide* assignee for value of a non-negotiable *chose in action* might profitably have been more extensive than that contained in the footnote on page 1370. But the most important omissions have been adequately supplied by the editor. The many cross-references inserted in this edition and the revised index make the matter contained in the book much more readily accessible than formerly. It may be added that there are many references in the footnotes to the pages of this REVIEW. A. W. S.

THE LAWS OF ENGLAND. By the Right Honorable the Earl of Halsbury and other lawyers. London: Butterworth and Company; Philadelphia: Cromarty Law Book Company.

Vol. XIII. Equity to Evidence. 1910. pp. ccxxii, 632, 107.
Vol. XIV. Execution to Fisheries. 1910. pp. cxcvi, 642, 77.
Supplement to Vols. 1–12. 1910. pp. xl, 197.

These volumes sustain the excellence of their predecessors, and in some respects are the most interesting of all for American lawyers. The supplement is well done, and is a most useful piece of work. It makes one envious of the English lawyer, of whose case law a considerable portion for three years is contained in so small a compass.

The importance of the articles in Vol. XIII is indicated by the great number of cases cited in it, as compared with those cited in other volumes. The important articles are Equity (175 pages), Estate and other Death Duties (153 pages), Estoppel (94 pages), and Evidence (216 pages). All these articles show clear analysis of the subject and an adequate though concise presentation of it. Three great heads of equity, Injunction, Specific Performance, and Trusts, are to be separately treated. The present article gives the general principles of equity jurisdiction, equitable interests, equitable doctrines, equitable relief against forfeitures and breaches of fiduciary obligations, and equitable defenses. The article on Estate Duties is timely, in view of the vast recent extension of our inheritance taxes. The articles on Estoppel and Evidence deal with subjects of the greatest practical value.

Volume XIV contains articles on Execution (129 pages), Executors and Administrators (217 pages), Explosives (47 pages), Extradition (27 pages), Factories and Shops (103 pages), Family Arrangements (14 pages), Ferries (10 pages), and Fisheries (72 pages). This is a more miscellaneous volume, and largely devoted to articles of exclusively English interest; but the principal article, that on Executors, is an admirable treatise on a subject of general law, and will be of great use to the American lawyer, for whom the present books on probate law and practice still leave something to be desired on points of history and general principle. J. H. B.

THE FEDERAL PENAL CODE. Annotated by George F. Tucker and Charles W. Blood. Boston: Little, Brown and Company. 1910. 8vo. pp. lvii, 507.

The first fruit of the general revision of the federal statutes which has been in progress by Congressional committees during the last few years was the Criminal Code which was passed on March 4th, 1909, and went into effect on January 1st, 1910. By this code Congress attempted to embody in one act all federal penal provisions except such as are not properly separable from the general body of the law to which they are merely ancillary, *e. g.* the penal provisions of the National Banking Act, Customs Laws, etc.

The new Criminal Code is built very largely on the pre-existing Revised Statutes, making only such changes and additions as experience in the administration of the criminal law called for. A retrogressive step was taken by incorporating into the federal law the embarrassing classification of crimes into misdemeanors and felonies (§ 335). The construction of the different sections of the Criminal Code can intelligently be made, therefore, only in the light of the interpretations worked out under the parent provisions.

The present volume is another attempted convenience for the practitioner in its effort to give the predecessor provisions of the respective sections and to bring together the various cases which have passed on those provisions. In addition the authors, in an appendix, set forth other statutes having penal provisions which were brought together by the Congressional revisers, so that practically the whole body of the criminal statute law is contained in this volume.

Three requirements are essential to the widest usefulness of a work of this character: (*a*) facility of reference, (*b*) accuracy, (*c*) thoroughness in the citation of cases. The book falls short in at least two of these requirements. The weight of decisions under the prior form of the law is entirely dependent upon changes made in such law by the revision. Easy comparison between the old and the amended law should therefore be available. This consideration seems to have been quite overlooked by the annotators. Throughout the book sections of the new Criminal Code are stated to have been the same as some prior section of the Revised Statute, except "with slight changes" or "with considerable changes," or a section is said to be founded on some prior law but "greatly enlarged," without indicating the changes or additions. We hope that in a second edition of their work the authors will graphically indicate in the body of the statute itself the amendments which the new code makes, by the customary method of italicizing new matter and bracketing omitted portions of the old law.

We also regret to have noted a lack of complete citation of authorities in many instances. A number of cases pertinent under the different sections are not referred to at all, and as to others the subsequent appellate history of the case is omitted. We particularly call attention to the fact that the authors, in common with most text-writers, fail to indicate the denials of application for *certiorari* by the Supreme Court. Such denials have considerable weight as indicating that the Supreme Court has left the construction of the Circuit Courts of Appeal undisturbed. (See, for instance, *Wechsler* v. *United States*, 158 Fed. 579, 580, and *United States* v. *Morse*, 161 Fed. 429, 436.)

On the other hand it is a pleasure to find that cases are accurately cited and the rulings adequately indicated. In spite of the limitations pointed out the book is extremely useful to the increasing number of criminal practitioners in the federal courts.

The book is exceedingly well gotten up. The publishers deserve especial thanks for the clearness and size of the type. F. F.

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THE SCOPE AND PURPOSE OF SOCIOLOGICAL JURISPRUDENCE.

I.

SCHOOLS OF JURISTS AND METHODS OF JURISPRUDENCE.

UNTIL recently, it has been possible to divide jurists into three principal groups, according to their views of the nature of law and of the standpoint from which the science of law should be approached. We may call these groups the Philosophical School, the Historical School, and the Analytical School.[1] On closer analysis, the Philosophical School falls into three: an Eighteenth-Century Law-of-Nature School, perhaps still represented by a Rousseauist School in France,[2] and not without representatives in American juristic thought,[3] a Metaphysical School, dominant in

NOTE. — The substance of these papers will appear in a forthcoming book to be entitled "Sociological Jurisprudence."

[1] On schools of jurists, reference may be made to Bergbohm, Jurisprudenz und Rechtsphilosophie, 3–37; Dahn, Rechtsschulen, in his Rechtsphilosophische Studien, 132; Dernburg, Pandekten, I, §§ 16–17; Windscheid, Pandekten, I, §§ 7–10; Bryce, Studies in History and Jurisprudence, Essay XII; Pollock, Oxford Lectures, 1–36; Lightwood, The Nature of Positive Law, ch. 11–14. See also Bluntschli, Die neueren Rechtsschulen der deutschen Juristen; Bekker, Ueber den Streit der historischen und der filosofischen Rechtsschule.

[2] Acollas, L'Idée du droit (2 ed. 1889); Introduction a l'étude du droit (1885). *Cf.* Beaussire, Les principes du droit (1888), Introduction.

[3] See Campbell, The Science of Law according to the American Theory of Government, 1887; Smith, The Law of Private Right, 1890 (see particularly Part III, ch. 3); Hughes, Datum Posts of Jurisprudence (1907); Andrews, American Law (2 ed.), 1908 (see vol. I, §§ 103–104, 112). *Cf.* Bishop, Non-Contract Law, § 85. The statements of Sir Frederick Pollock, Oxford Lectures, 33, that "there are even one or two

philosophical jurisprudence during the first half of the nineteenth century,[4] and a Social-Philosophical School, of which there are several varieties, but in which the Neo-Hegelians seem to have the most fruitful program.[5] The historical jurists may be distinguished into a German Historical School, whose method is philosophical (indeed often metaphysical) and historical, and an English Historical School, whose method is comparative and historical. The Analytical School, likewise, has an older and a newer phase. The older type, which adhered to the analytical method exclusively,[6] may be distinguished from a later English school, whose method is historical as well as analytical.[7] Thus it will be noted that there is a marked tendency to abandon the exclusive use of any one method, and to bring these formerly divergent schools into something like accord. In this movement, however, propinquity hitherto has played a curious part. The German Historical School arose in a country dominated by philosophical methods and at a time when the Metaphysical School was at its strongest. Hence its methods were philosophical as well as historical. The English Historical School arose by way of revolt from a predominant analytical school. Hence its methods are comparative and historical, and the representatives of this school have regarded them as supplementary to analytical methods, rather than as self-sufficient.[8] Similarly they have been at one with analytical jurists in their esti-

American writers of great ability for whom, as for the German expounders of *Naturrecht*, legal science appears to consist in a perpetual flux of speculative ideas" and that American theoretical work "is mostly akin to that of the [older] German philosophical and historical schools," although denied by Judge Dillon (Laws and Jurisprudence of England and America, 144), appear to be well taken as applied to the historical school in this country.

[4] For detailed grouping of jurists from the standpoint of the Metaphysical School, see Ahrens, Cours de droit naturel (8 ed.), I, 26–80; Lorimer, Institutes of Law (2 ed.), 38; Miller, Lectures on the Philosophy of Law, Appendix E. *Cf.* Mr. Kocourek's note to his translation of Gareis's Science of Law, 12.

[5] See Berolzheimer, Für den Neuhegelianismus, Archiv für Rechts und Wirthschaftsphilosophie, III, 193.

[6] *E. g.* Markby, Elements of Law (1 ed. 1871); Amos, Systematic View of the Science of Politics (1872); Holland, Elements of Jurisprudence (1 ed. 1880).

[7] *Cf.* Jenks, Law and Politics in the Middle Ages, ch. I. Perhaps Salmond, Jurisprudence (1 ed. 1902), represents a philosophical tendency in what is still the Analytical School.

[8] Maine, Ancient Law (Pollock's ed.), 6; Jenks, Law and Politics in the Middle Ages, 2. In consequence "reconciliation" of analytical and historical jurisprudence has come to be a common-place. See, for example, Taylor, Science of Jurisprudence, 22.

mate of philosophical methods.[9] And in America, where eighteenth-century theories of natural law took root in constitutional law through bills of rights and the judicial power over unconstitutional legislation, and the analytical theory has had to contend for recognition, more than one professed adherent of the Historical School shows notable affinities to the older Philosophical School.[10] On the other hand, the influence of the revolt from the Analytical School in England has given to recent analytical jurists a noticeable historical bent,[11] while in Germany, the rise of legislation, instead of creating an analytical school, has merely given an analytical turn to jurists who must be counted still as philosophical or as historical.[12] Moreover the Philosophical School, except in Scotland and in Italy, until the recent revival of interest in philosophy, was almost becoming historical.[13]

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[9] Compare with Austin's "Jargon of the Germans," Bryce, Studies in History and Jurisprudence, Essay XII (American ed. pp. 609–612); also Mr. Bryce's remarks before the Association of American Law Schools, 31 Rep. Am. Bar Ass'n, 1061, 1063.

[10] *E. g.* Carter, Law, Its Origin, Growth and Function, 133, 637. See Hammond, Blackstone, I, 97.

[11] The recent analytical jurists, who correct the conceptions of Austin to accord with the views of historical jurists, have been called "Neo-Austinians." Jethro Brown, The Austinian Theory of Law, Excursus E.

[12] A few formulas and definitions from recent German jurists will make this clear. I. Philosophical jurists: "Law is the order (*Ordnung*) based upon autonomous government in a state of civilization" (Berolzheimer, System der Rechts und Wirthschaftsphilosophie, iii, 17); "The purpose of all law is a determinate external behavior of men toward men. The means of attaining this purpose, wherein alone the law consists, are norms or imperatives" (Bierling, Juristische Prinzipienlehre, i, § 3); "Law is a peaceable ordering (*Friedensordnung*) of the external relations of men and their communities to each other. It is an ordering, *norma agendi*, a regulating through the setting up of commands and prohibitions" (Gareis, Enzyklopädie und Methodologie der Rechtswissenschaft, § 5); "Hence the rule armed with force first gives us the conception of law. That which does not possess the guarantee lying in force, cannot be called law" (Lasson, System der Rechtsphilosophie, 207); "The legal order is an adjustment through coercion of the relations of human life" (Kohler, Einführung in die Rechtswissenschaft, § 1). II. Historical jurists: "Law is the ordering of the relations of life guaranteed (*gewährleistete*) through the general will" (Dernburg, Das bürgerliche Recht des deutschen Reichs und Preussens, i, § 16); "But one must bear in mind that the final basis of all law lies in the power of the State. . . . Enacted law and customary law are to be carried back to this same power, the one as expressed, the other as tacit will thereof" (Czyhlarz, Institutionen, § 4). *Cf.* Bergbohm, Jurisprudenz und Rechtsphilosophie, 546: "To be positive law and to come into existence historically by being laid down as a binding rule, is simply one and the same thing." The Austinian would not find much to complain of in these formulas.

[13] Prins, La philosophie du droit et l'école historique, 8.

We should expect a new school to arise from this breakdown of the older schools, and there are many signs that such an event has taken place. Jurists are coming together upon a new ground from many different starting points. Some of them profess to find this new ground, potentially at least, in the schools from which they set out. But there is much to indicate that instead of a further variation of one of the old creeds, a wholly new creed is framing. The rising and still formative school to which we may look chiefly henceforth for advance in juristic thought, may be styled the Sociological School.

1. Analytical Jurisprudence.

The analytical jurist pursues a comparative study of the purposes, methods and ideas common to developed systems of law by analysis of such systems and of their doctrines and institutions in their matured forms.[14] This is one of the oldest and at the same time one of the most recent methods of legal science. Jhering tells us that the beginnings of legal science among the Romans are to be seen in the earliest and crudest form of analysis,[15] which is reproduced exactly in the "putting of differences" and "taking of diversities" so characteristic of the Elizabethan era in our own system. But as a method of jurisprudence this method requires a condition of stability in the legal systems analyzed. Hence it is appropriate to a developed system only, and begins to be employed only as legal systems reach maturity.[16] Moreover, as the growing-point in a matured system is more and more in legislation, the analytical theory of law is imperative or positive. Law is looked

[14] See Gray, The Nature and Sources of Law, §§ 1–19; Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, 18–20; Bergbohm, Jurisprudenz und Rechtsphilosophie, 12–20.

[15] Geist des römischen Rechts, III, 11.

[16] In England, analytical jurisprudence begins with Austin, The Province of Jurisprudence Determined (1832). In Germany, under the name of *Allgemeine Rechtslehre*, it begins to be important with Binding, Die Normen und ihre Übertretung (1872–1877). See Sternberg, Allgemeine Rechtslehre, I, § 13 B; Bergbohm, Jurisprudenz und Rechtsphilosophie, 17. Perhaps it is significant that the Hungarian Finkey, in his recent historical introduction to jurisprudence (1908), styling himself an adherent of what he calls "the modern positive school of philosophy of Law," puts Austin first among the masters of that school, naming also Jhering, Binding, and Bierling. Barany, Aus der Ungarischen Rechtsphilosophie, Archiv für Rechts und Wirthschaftsphilosophie, III, 48, 49.

upon as something that is made. In its crudest form, this is expressed in Austin's dogma that a law is a command. To-day under the influence of Binding and Jhering, it commonly takes the form of regarding law as a body of standards or norms established or recognized by the state, or, in another view, originating in society but laid down by the judicial organs of the state.[17] The kernel of it is that law "is a product of conscious and increasingly determinate human will." [18] The characteristics of the analytical school, then, may be said to be:

1. They consider developed systems only.

2. They regard the law as something made consciously by lawgivers, legislative or judicial.

3. They see chiefly the force and constraint behind legal rules. To them, the sanction of law is enforcement by the judicial organs of the state, and nothing that lacks an enforcing agency is law.

4. For them the typical law is statute. But the backwardness of legislative law-making in America is reflected in a position taken by American jurists, whose point of view is otherwise analytical, which with respect to legislation is superficially akin to that of the Historical School.

5. Their philosophical views are usually utilitarian or teleological.

Bearing in mind these characteristics of the analytical jurists, the limitations of their method are evident. The adherents of the English Historical School have been active in showing the errors in the conception of law derived from considering developed systems only.[19] But from the sociological point of view we may find a more serious objection in the practical effect of confining juristic study to the analytical method. Analytical jurisprudence is a

[17] See Gray, The Nature and Sources of Law, § 213. *Cf.* Jenks, Law and Politics in the Middle Ages, 2 : "Despite criticism, Austin's position is unassailable, regarded as a summary of existing facts. What the State wills, that, and that alone, can the individual be compelled to obey." See also Willoughby, The Nature of the State, ch. 7.

[18] Munroe Smith, Jurisprudence, 37. This statement of Jhering's view cannot be bettered. Compare: "Law is the voluntary and intended work of humanity." Korkunov, General Theory of Law (Hastings' transl.), 116.

[19] Perhaps the best answer to these criticisms has been made by Mr. Jenks: "Not only do systems of law change their contents, but the conception of law itself changes with the progress of mankind." Law and Politics in the Middle Ages, 3.

general theory of law drawn from Roman and English law.[20] It brings everything to the test of principles obtained from analysis and comparison of those systems. Thus it leads us by one path, just as the historical method leads us by another, to a jurisprudence of conceptions, in which new situations are to be met always by deduction from old principles, and criticism of premises with reference to the ends to be subserved is neglected. In the pursuit of principles there is a tendency to forget that law is a practical matter. The desire for formal perfection seizes upon jurists. Justice in concrete cases ceases to be their aim. Instead, they aim at thorough development of the logical content of established principles through rigid deduction, seeking thereby a certainty which shall permit judicial decision to be predicted in detail with absolute assurance. Kantorowicz puts it thus:

"The prevailing ideal of the jurist is this: A superior magistrate with academic training, he sits in his cell armed only with a thinking-machine, though concededly one of the finest type. The only furniture is a green table, upon which the official code lies before him. One hands him any case you will, actual or hypothetical, and, performing his duty, he is prepared with the help of purely logical operations and a secret technique, intelligible only to himself, to point out with absolute exactness the decision predetermined by the law-giver in the code." [21]

One need not say that it is impossible to realize this ideal. But the attempt to do so, whether upon the basis of a code or upon that of a body of case-law, brings about a mechanical administration of justice which, in the long run, must break down.

Again, however true the imperative theory may be with respect to the manner in which norms are established in matured legal systems, its tendency is to lead law-makers, legislative and judicial, to overlook the need of squaring the rules upon the statute book, or in the reports or doctrinal treatises, as the case may be, with the demands of reason and the exigencies of human conduct in the one case, and with the demands of social progress in the other case. We are told that when contact with the Romans taught Teutonic

[20] See the remarks of Bergbohm upon the English analytical jurists. Jurisprudenz und Rechtsphilosophie, 333 n.

[21] Gnaeus Flavius, Die Kampf um die Rechtswissenschaft, 7. Perhaps it should be said that the "green table" of the original is the German term for what we should call "red tape."

peoples that through the written page they could make and alter the law as well as record it, a ferment resulted. In somewhat the same way, when lawyers perceive they may deduce law from settled premises and peoples discover they may enact law without premises, a ferment ensues. When juristic speculation is merely a discovery of the supposed dictates of universal human reason and legislation is deemed an application of universal principles to particular situations, the former is free to examine its premises and the latter is bound to have premises. But once admit an imperative theory as a theory of law, it becomes also a theory of law-making. When the doctrine is *quod principi placuit legis habet vigorem*, it matters little whether the *princeps* is a Roman emperor, represented by jurisconsults who legislate in his name, or the people of an American commonwealth speaking through the judiciary committees of their legislature. In either case, the feeling that a declaration of the sovereign will suffices to make law will give rise to a mass of arbitrary detail which cannot obtain the force of law in practice.[22] Experience has shown abundantly that rule and order in the administration of justice are best attained by making it possible to measure relations and situations, as they become the subjects of controversy, by reason. To a certain extent, the will of society as to the relations of individuals with each other may be ascertained and declared in advance. But, as a rule, this is possible only along general lines. Hence, for the great mass of causes, the ideals of uniformity and certainty are to be reached by requiring and permitting the magistrate to bring to bear upon them a trained reason and an enlightened, disciplined sense of justice. The imperative theory is a natural concomitant of a period of legislation. But it is not expedient that law-makers adhere to and be governed by it.[23] Nor is it altogether expedient that judges, wielding the common-law power of making binding precedents, have before them consciously a theory that they make law rather than find and declare it.[24] It does not make an imperative theory the "true" theory to

[22] See Parker, The Congestion of Law, 29 Rep. Am. Bar Ass'n, 383 ; Burgess, Some Recent Tendencies in Texas Laws (address before the Texas Bar Ass'n), 1910.

[23] "The more, however, law comes to be seen to be merely positive, the command of a law-giver, the more difficult it is to put any restraints upon the action of the legislature." Figgis, From Gerson to Grotius, 85.

[24] "No judge in England or in the United States ever did need to be told, I think, that he has power to make law, but many judges in England and the United States

show that it expresses what actually takes place in modern law-making. For to no small extent what so takes place does so under the influence of the theory. Law is not like a natural phenomenon whose workings have to be accounted for by observation and discovery of a theory that will fit the facts. What is law depends not merely upon the facts of the past and of the present but also upon the will of those who prescribe and those who administer rules of conduct by the authority of the state; and this will is determined not a little by their theory of what they do and why they do it. The rules are not prescribed and administered for their own sake, but rather to further social ends. An exposition of how they are prescribed and administered is inadequate. The problem is not merely how law-making and law-administering functions are exercised, but also how they may be exercised so as best to achieve their purpose, and what conception of these functions by those who perform them will conduce best thereto. Here, certainly, the pragmatic criterion is sound. The true juristic theory, the true juristic method, is the one that brings forth good works.

2. Historical Jurisprudence.

The historical jurist pursues a comparative study of the origin and development of law, legal systems, and particular doctrines and institutions.[25] This was the last of the three methods to develop, and in recent times has been, perhaps is still, the method most in vogue. Its pioneer is Cujas at Bourges in the first part of the sixteenth century. But the Historical School really begins in

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have needed to be reminded from time to time, *vi et armis*, of the constitutional and legal restraints binding upon them when engaged in the judicial process of making law; and few indeed have been the judges, especially in the United States, who have shown a sound understanding as to when those restraints are rigid and when they are elastic and flexible. When you say judges only declare pre-existing law, you emphasize those restraints and keep them fresh in the memory better than when you say judges make law." Again: "The 'fiction' that judges only declare law is all that stands between us and a judicial autocracy." Schofield, Uniformity of Judge-Made Law, 4 Ill. L. Rev. 533, 537.

[25] A good critique of the German Historical School may be found in Korkunov, General Theory of Law (Hastings' transl.), 116–122. See also Leonhard, Methods Followed in Germany by the Historical School of Law, 7 Col. L. Rev. 573, 577, 579; Bekker, Recht des Besitzes, § 1; Charmont, La renaissance du droit naturel, 74–94.

the fore part of the nineteenth century with Friedrich Carl von Savigny (1779–1861).[26]

In opposition to the analytical jurist, the historical jurist and the philosophical jurist agree that law is found, not made, differing only with respect to what it is that is found. The philosophical jurist conceives that a principle of justice and right is found and expressed in a rule; the historical jurist, that a principle of human action or of social action is found by human experience and is gradually developed into and expressed in a rule. Hence the Historical School deny that law is a product of conscious or determinate human will. They doubt the efficacy of legislation, in that it seeks to achieve the impossible and to make what cannot be made.[27] They hold that the living organs of law are doctrinal writing and judicial decision, whereby the life of a people, expressed in the first instance in its traditional rules of law, makes itself felt in a gradual development by molding those rules to the conditions of the present.

Hence, in contrast with the Analytical School, the historical jurists may be characterized thus:

1. They consider the past rather than the present of law.

2. They regard the law as something that is not and in the long run cannot be made consciously.

3. They see chiefly the social pressure behind legal rules. To them, sanction is to be found in habits of obedience,[28] displeasure

[26] Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, 230–231; Dernburg, Pandekten, I, § 17, 2; Lightwood, The Nature of Positive Law, ch. 12.

[27] "These propositions [for codes] are connected with a general view of the origin of all positive law which formerly prevailed with the great majority of German jurists. According to this view, under normal circumstances all law consists of enactments, that is, express precepts of the highest power in the State. The science of law has for its subjects nothing more than the content of enacted rules. Accordingly, legislation itself as well as the science of law is held to be of wholly fortuitous and changeable content, and it is considered entirely possible that the law of to-morrow appear wholly unlike that of to-day. According to this theory, a complete statute book is an urgent need, and only in case the statute book is in a defective condition are we under the unfortunate necessity of resorting to customary law as a feeble supplement. . . . Stated summarily . . . [the correct] view is that all law arises in the manner which the prevailing (though not entirely adequate) usage calls 'customary law'; that is, it is produced first by custom and popular belief, and then through course of judicial decision, hence, above all, through silent, inner forces, and not through the arbitrary will of a law-maker." Savigny, Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft (3 ed.), 6–7, 13–14.

[28] Maine, International Law, Lect. II; Westlake, International Law, I, 7.

of one's fellowmen,[29] public sentiment and opinion,[30] or the social standard of justice.[31]

4. Their type of law is custom, or those customary modes of decision that make up a body of juristic tradition or of case law.

5. As a rule, their philosophical views have been Hegelian; partly because the school arose when Hegel's influence was paramount, but partly also because of an intrinsic sympathy.

With reference to the latter point, it has been said that Hegel's philosophy was "exactly the right philosophy for the historical school of law." [32] At any rate, Hegel's philosophy was a philosophy of and for the professional class,[33] and its vogue in the English universities and the prevalence in American juristic thinking of a doctrine hostile to legislation, the agency of social progress in modern democracies, are not without significance.

From the sociological point of view, the chief objection to confining juristic study to the historical method is similar to that first urged above against the analytical method. For the Historical School also works *a priori*. It has deduced from and tested existing doctrines by a fixed, arbitrary, external standard. Having no true philosophical method of their own, as Berolzheimer has pointed out, when the German historical jurists overthrew the premises of the Eighteenth-Century Law-of-Nature School, they preserved the method of their predecessors, merely substituting new premises. They had, he says, neither the capacity nor the desire to put a new philosophy of law in the place of the buried law of nature. They sought the nature of right and of law in historical deduction from the Roman sources, from Germanic legal institutions, and from the juristic development based thereon.[34] In the United

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[29] Clark, Practical Jurisprudence, 134.

[30] Rivier, Principles du droit des gens, I, 7; Lightwood, The Nature of Positive Law, 362, 389.

[31] Carter, The Ideal and the Actual in Law, 10.

[32] Erdmann, History of Philosophy (Hough's transl.), III, 328.

[33] See Talbert, The Dualism of Fact and Idea in its Social Implications (1910).

[34] Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, 4. A sympathetic critic said recently: "But, although the fundamental principles of the historical school were sound, there have been developed within this school certain doctrines and certain tendencies which provoked a wholesome reaction. Of these I must name: (1) Pure positivism; that is the acceptance of everything which has come into the law in earlier times, without any criticism of its value for the present time. (2) An unnatural separation of the German and Roman elements in modern law. . . .

States, this natural law upon historical premises has gone even further. With us the basis of all deduction is the classical common-law — the English decisions and authorities of the seventeenth, eighteenth and first half of the nineteenth centuries. Our jurists have made of this a very *Naturrecht.* They have asked us to test all new situations and new doctrines by it. Indeed many of our courts have gone out of their way to construe statutes by it, and Mr. Carter tells us that it is a wise doctrine to presume that legislators intend no innovations upon this common law, and to assume, so far as possible, that statutes were meant to declare and reassert its principles.[35] More than this, through the power of courts over unconstitutional legislation and the doctrine that our bills of right are declaratory, courts have forced it upon modern social legislation. Thus the leading conceptions of our traditional case law come to be regarded as fundamental conceptions of legal science, and not merely the jurist, but the legislator, the sociologist, the criminologist, the labor leader, and even, as in the case of our corporation law, the business man, must reckon with them. In consequence, when the commissioners on Uniform State Laws, in drafting a uniform commercial law, propose changes of existing rules incidentally, we are told that they are "codifying in the air and will probably do more harm than good to commerce and mercantile law." [36] In the same spirit, a very proper statement of one of the commissioners that he would be ashamed to go before a legislature to present the proposed Bills of Lading Act and, if asked whether it represented the best thought of the time, be forced to say, "No, it does not, but this is the condition of stagnation that existed two years ago," is criticized by a professor of law because the commissioner advocates departure from existing rules which are sustained by the weight of judicial authority in order to restate the law in accordance with ideals of what it should be, although the ideals "accord with business usages or even with what those usages are tending to become." [37] Likewise the attempt to

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(3) The overrating of old times in comparison with the history of the last centuries." Leonhard, Methods Followed in Germany by the Historical School of Law, 7 Col. L. Rev. 573, 577.

[35] Law, Its Origin, Growth and Function, 308–309.

[36] Burdick, A Revival of Codification, 10 Col. L. Rev. 118, 123 (quoting Judge Chalmers).

[37] *Ibid.* 126.

put the law of partnership upon a better basis through the proposed partnership act and to bring it into accord with the uniform understanding of business men, is resisted by teachers of law, who insist that the traditional course of judicial opposition to the mercantile view shall be perpetuated in the code.[38] Another example may be seen in the attitude of many of our law teachers toward the codes of procedure. It was natural when these codes were first enacted that judges trained in the traditional system should look upon them with suspicion and incline to restrain the reforms within as narrow bounds as possible. Accordingly in several states what amounted to a system of actions was fastened upon pleading in spite of the code provisions.[39] But when a court, in a jurisdiction where the matter had remained open, refused to take this step backward and, following ample precedent in other jurisdictions,[40] gave effect to the spirit, if not actually the letter, of the code, an eminent teacher of procedure criticized the decision severely, quoting a judicial dictum that "the inherent and essential differences and peculiar properties of actions have not been destroyed, and from their very nature cannot be." [41] The tendency of practising lawyers to regard the doctrines of the system in which they have been trained as parts of the legal order of nature [42] is thus

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[38] See a note in 23 Green Bag, 220.

[39] Supervisors *v.* Decker, 30 Wis. 624; Rush *v.* Brown, 101 Mo. 586 (following earlier cases in Missouri); Mescall *v.* Tully, 91 Ind. 96. Wisconsin has abandoned this position. Manning *v.* School District, 124 Wis. 84, 91; Baunen *v.* Kindling, 142 Wis. 613. See a note upon this subject in 24 HARV. L. REV. 480.

[40] *E. g.* White *v.* Lyons, 42 Cal. 279; Rogers *v.* Duhart, 97 Cal. 500; Cole *v.* Jerman, 77 Conn. 374; Gartner *v.* Corwine, 57 Oh. St. 246.

[41] 8 Mich. L. Rev. 315–318, criticizing Cockerell *v.* Henderson, 81 Kan. 335.

[42] For example, as good a lawyer as Mr. Bayard, when Secretary of State, engaged in a controversy with the representatives of a friendly power, and perhaps did them an injustice, because he was unable to conceive of any principle of jurisdiction over crimes other than the territorial theory upon which our common law proceeds. Cutting's Case, Snow, Cases on International Law, 172. See also Marcy's confusion of the rules as to citizenship in the several states of the United States with the rules of international law as to national character. Cockburn, Nationality, 118 *et seq.* Also the attitude of many of our courts toward legislation proceeding upon the theory of criminal jurisdiction in the *forum laesae civitatis*. State *v.* Knight, 2 Haywood (N. C.) 109; State *v.* Carter, 27 N. J. L. 499; dissenting opinion in Hanks *v.* State, 13 Tex. App. 289. In like manner, eminent judges have sometimes taken constitutional provisions in our bills of rights for necessary *fundamenta* of all law, *e. g.* Miller, J., in Loan Ass'n *v.* Topeka, 20 Wall. (U. S.) 655, 662. This attitude of bench and bar is a formidable obstacle both to social legislation and to law reform, as has been shown

reinforced by the almost uncontested supremacy of the Historical School in our institutions of learning.[43] Bluntschli's critique of Savigny points out the vulnerable side of historical jurisprudence:

"The critical examination of the past is necessary in order to discover the grounds upon which we rest, but the consideration of the future is none the less necessary in order to determine whither we are going. All law is truly of the present; the past is no more, except in so far as its forces operate in the present; and the future is not yet, except in so far as it is already a condition in the present. The present is, therefore, a union of the past and future. It alone is real. There is something that is often not sufficiently recognized by the Historical School." [44]

Moreover, it is only true in part that law represents principles of human action found by experience and developed into rules. Quite as often it represents juristic development of the analogy that chanced to be at hand when the institution or doctrine was formative. Having taken that line, juristic thought will be found adhering to it with remarkable persistency, often in the face of convenience and of the experience of the community. The case of the law of partnership, referred to above, may be instanced. When Roman lawyers were first called upon to work out a theory of partnership, the analogy nearest at hand was the *consortium* of a family which, after death of the *paterfamilias*, retained an undivided inheritance.[45] Accordingly, the business partnership was assimilated

recently in the decision of the New York Court of Appeals upon the Employer's Liability Act. Girard has noted a like tendency of practitioners in France to regard the law of a given moment "as an immutable and eternal product." Manuel élementaire de droit romain (4 ed.), 6.

[43] See, for instance, the observations of the greatest of our historical jurists with respect to "unwarranted assumption of equitable powers" by our courts of law and equity jurisdiction (not separate courts of law only) in legal proceedings. 2 Ames, Cases on Equity Jurisdiction, 280, note 1;. Cases on Partnership, 489, note. Also the note in 4 HARV. L. REV. 394–395, speaking of the distinction between law and equity as "fundamental" and "eternal." Yet the law long ago took over equitable estoppel, the whole field of quasi-contract, with all equitable doctrines applicable thereto, the equitable defense of non-performance by a plaintiff of his side of a bilateral contract, failure of consideration, and many other equitable defenses; and the progression from equity to law has been remarked frequently. Millar, Historical View of English Government, quoted in 1 Spence, History of the Equitable Jurisdiction of the Court of Chancery, 416. Why must we insist that all power of growth in this regard came to an end in the eighteenth century?

[44] Geschichte der neueren Staatswissenschaft, 625, translated by Willoughby, Nature of the State, 158.

[45] See Salkowski, Institutionen, § 144.

to the old relations of common ownership and the law persisted in the line so drawn for it after the newer and better analogy of the juristic person had developed. It was very hard for Roman jurists to depart from the analogy of the *consortium* of co-heirs, so that Scaevola held equality of contribution, profit and loss necessary to the very idea of partnership,[46] and the Roman law insisted to the end that the property was joint property, that the debts were individual debts, and the causes of action individual claims of the individual partners. The modern law preserves much of this in the civil codes.[47] But the commercial codes have come to treat mercantile partnerships as entities.[48] Unhappily the common law, instead of following the custom of merchants, drew its ideas from the civilians, and so represents not the experience of Anglo-American merchants, but the influence of Dutch and French treatises on the formative Anglo-American commercial law,[49] and thus indirectly, a juristic tradition from republican Rome. Indeed it has been recognized repeatedly that law represents commonly not customary modes of popular action, but customary modes of judicial decision or juristic thinking, rooted in either case in a purely juristic tradition.

3. Philosophical Jurisprudence.

The philosophical jurist studies the philosophical and ethical bases of law, legal systems, and particular doctrines and institutions, and criticizes them with respect to such bases.[50] This method

[46] Inst. III, 25, § 1. *Cf.* Dig. XVII, 2, 30.

[47] French Civil Code, Arts. 1862, 1863; German Civil Code, §§ 705, 715.

[48] German Commercial Code, §§ 114, 124, 126.

[49] See the reliance on Puffendorff in Waugh *v.* Carver, 2 H. Bl. 235. Story, Partnership, § 2, takes his whole theory from civilians, quoting Pothier, Puffendorff, Domat and Vinnius.

[50] "Economics and law are related as content and form, as kernel and shell. Accordingly, the object of philosophy of law is the idea of the just on its formal side; the object of the philosophy of economics is the idea of the just according to its content." Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, viii. "The problem of the philosophy of law is to comprehend the existing law in its rational internal connection and its connection with the other orderings and phenomena of life." Lasson, System der Rechtsphilosophie, § 2. "Philosophical jurisprudence (*philosophische Rechtswissenschaft*) has for its object the idea of right and law, the conception of right and law, and the realization thereof." Hegel, Grundlinien der Philosophie der Rechts, § 1. "Philosophy of Law sets up the ideal for the legal order

is one of the oldest and in the modern world is the longest-continued method of legal science. The very beginnings of legal science may almost be said to lie in the contact of Roman lawyers and Greek philosophers in the later years of the Roman republic; in that combination of comparative law and rational speculation called the *ius gentium*,[51] in the appeal to reason against traditions and forms called the *ius naturale*. In the modern world, it begins at least with the seventeenth century. Indeed, the legal science of the seventeenth and eighteenth centuries was entirely philosophical. In the nineteenth century, along with all things philosophical, it fell into disrepute.[52] But a reaction has set in, and in Germany

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which is to be established practically, but does not set up any law having actual authority. There is no natural law with force to derogate from the positive law. The contrary idea in all its shades is only a result of confusing what ought to be with what is. The law which actually obtains, recognized as such, will always be incomplete; but it is always law. The true philosophy of law does not stand over against the existing law as something revolutionary, denying its authority, but only incites to reforms which correspond to the idea. But it is no mere history of law. It does not explain why and how the law which actually exists has become what it is and not something else, but it criticizes the law from the ethical standpoint, and sets forth its ethical, but not its historical basis." Geyer, Geschichte und System der Rechtsphilosophie, § 2. "What is meant by Philosophy of Law? The primary and most simple idea is that it is the philosophical part of law, that is, the rational element which enters into the complex formation of the legislation of every nation. This science, then, may be called also 'rational law.' In practice it is still often called by the name of 'natural law' which is opposed to the term 'positive law,' the latter designating the special laws of each people. Positive law having been defined as the aggregate of rules formulated by a law-maker and sanctioned by an external constraint, rational law should be conceived as the aggregate of rules which, in the eyes of reason, *ought* to be sanctioned by an external constraint. It is the ideal of the positive law, the type which the law-maker ought to realize, and almost always pretends to realize. . . . The special science which may be called properly the philosophy of law is the science of the just; the abundant and fertile development of the idea of absolute justice, which lies in every human soul, and its application to the diverse relations with which man is surrounded." Boistel, Cours de philosophie du droit, §§ 1, 2 (1899).

[51] "On the one hand there is the pure philosophical standpoint from which the *ius gentium* is surveyed. We investigate the ultimate material sources of the given law in general; and in that we recognize that a part, called *ius civile*, rests purely upon establishment by the state, another part, called, therefore, *ius naturale*, upon the highest jural truth. We recognize also in the *ius gentium* this absolute jural material positively realized, this real *ius naturale*. On the other hand there is the purely positive-law standpoint, furnished by comparative jurisprudence, from which the *ius gentium* is used to support the decision in question." Voigt, Das Ius Naturale, Aequum et Bonum, und Ius Gentium der Römer, I, 399–400.

[52] "To speak of philosophy of law passed for obsolete and out of fashion." Kohler, Lehrbuch der Rechtsphilosophie, 6 (1909).

the philosophical method is regaining, if it has not fully regained, its standing. In France and Italy it was not abandoned, and in France especially it is vital and vigorous.[53]

In comparison with the analytical and the historical jurists respectively, the philosophical jurists —

1. Are more apt to consider the ideal future of law than its past or present.

2. While agreeing with the historical jurist that law is not made but is found, yet in general believe that when found its principles may, and, as a matter of expediency, should be stated definitely and in certain form.

3. Look at the ethical and moral bases of rules rather than at their sanction.

4. Have no necessary preference for any particular form of law.

5. Hold very diverse philosophical views, so that, in a way, there is not so much a philosophical school as a group of philosophical schools.

It is not easy to induce the Anglo-American lawyer or legal scholar to consider the philosophical method seriously. But it is to be remembered that the discredit which attaches to it in England and America comes from taking the metaphysical method of the first half of the nineteenth century for philosophical jurisprudence. By way of reaction from the over-strained idealism of the first part of the nineteenth century and in consequence of the failure of the attempt to explain everything "in a speculative-metaphysical way by a spiritual-logical principle," in the second third of that century "philosophy lost confidence in itself and was subjected to popular contempt." [54] Metaphysical juristic speculation of the same type fell into deserved contempt a little later, and the eminent English authorities who have maintained that jurisprudence and the philosophy of law have no connection [55] speak for that period. But attempting to construct abstract systems by reasoning from assumed first principles is not the final form of

[53] Salleilles, École historique et droit naturel d'après quelques ouvrages récents, Revue trimestrielle de droit civil, 1902, I, 80; Ehrhardt, La crise de philosophie de droit; Demogue, Les notions fundamentales du droit civil, 21; Charmont, La renaissance du droit naturel (1910).

[54] Paulsen, Introduction to Philosophy (Thilly's transl.), preface (p. xiv).

[55] Pollock, Essays in Jurisprudence and Ethics, 25 (1882); Pollock and Maitland, History of English Law, Introduction, 1 ed., pp. xxiv–xxv (1895).

philosophical jurisprudence. Hence, when Mr. Bryce tells us that German jurists of the last half of the nineteenth century left *Naturrecht* to others and were "philosophical in their use of the analytical and historical methods," [56] he by no means disposes of the Philosophical School. For we are not bound to accept *Naturrecht* as the philosophy of law. It is as unfair to identify the philosophical method absolutely with Krause or Ahrens or Röder or Lorimer as to identify analytical jurisprudence absolutely with the text of Austin. A new generation has shown that it is possible to have a philosophy of the law that is.[57] The discredit which attached to this department of the science is due, then, chiefly to the failure of attempts to make a metaphysical method do the work of all the methods of jurisprudence. As was once true of the analytical method in England, too much has been claimed for the philosophical method and often it has been misdirected sadly. For a time Austin was followed so blindly that there seemed danger presently he would be abandoned no less blindly. The present Anglo-American attitude toward the philosophy of law has its counterpart in the phase of juristic thought from which we have happily emerged, in which it was fashionable for every dabbler in jurisprudence to have his fling at Austin.

Even when misdirected and overworked, the rationalizing in-

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[56] Studies in History and Jurisprudence (American ed.), 634. Korkunov, who shows many traces of English influence, likewise conceives of the philosophy of law as necessarily identical with the metaphysical jurisprudence of the nineteenth century, defining it as "the metaphysical science of absolute legal principles." General Theory of Law (Hastings' transl.), 31. He conceives that it is an attempt "to establish a science of law by the deductive method." *Ibid.* 7. Even when he wrote, philosophical jurisprudence was getting away rapidly from such notions.

[57] "The modern philosophy of law comes in contact with the natural-law philosophy in that the one as well as the other seeks to be the science of the just. But the modern philosophy of law departs essentially from the natural-law philosophy in that the latter seeks a just, natural law outside of positive law, while the new philosophy of law desires to deduce and fix the element of the just in and out of the positive law — out of what it is and of what it is becoming. The natural-law school seeks an absolute, ideal law, 'natural law,' the law κατ' ἐξοχήν, by the side of which positive law has only secondary importance. The modern philosophy of law recognizes that there is only *one* law, the positive law; but it seeks its ideal side and its enduring idea." Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, 17. Compare Wallaschek's formula, "the science of juristic thought," Studien zur Rechtsphilosophie, 107, and Kohler's position that the province of philosophical jurisprudence is philosophical study of the evolutionary processes by which law is formed. Holtzendorff, Enzyklopädie der Rechtswissenschaft (6 ed.), 9.

fluence of the philosophical method has been invaluable. In civilized countries, men are compelled to administer justice by formulas. These formulas are designed to express ideas of right and justice and as a means to promote right and justice. But there is always danger that we forget those ideas and lose sight of those ends and treat the formulas as existing for their own sake. Since the time of the Stoics, men have appealed to "Nature" to save ethical, political, and juristic thinking from this danger; and by "Nature" they have meant reason and general principles of right. The appeal to reason and to the sense of mankind for the time being as to what is just and right, which the philosophical jurist is always making, and his insistence upon what ought to be law as binding law because of its intrinsic reasonableness, have been the strongest liberalizing forces in legal history.[58]

Philosophical method has an important function also in supplementing the analytical and the historical methods in testing the apocryphal reasons worked out in later times to explain or justify the rules of the past. Analytical jurists and historical jurists often do a good service by exposing these "reasons" and ridding us of them.[59] But each too often is to be found developing by analogy rules which deserve to be forgotten or putting reasons under rules to bolster them up, when they ought to be allowed to fall.[60] Each is not unlikely in particular cases to "adduce a good reason for a bad thing and suppose he has in that way justified it." [61] It is only by criticism from the standpoint that rules of law are expressions or illustrations of principles of right and justice that these tendencies may be kept down. Moreover a naïve philosophy of law will be found behind the juristic thinking of most of those who affect to despise philosophical jurisprudence. This is very noticeable in the natural law of the practising lawyer, examples of which

[58] On the idea of right as a source or creative agency of law, in that it is always critical of existing law, see Del Vecchio, Il sentimento giuridico (2 ed. 1908).

[59] Professor Gray considers that this is the chief service of analytical jurisprudence and that its most valuable function is negative. Some Definitions and Questions in Jurisprudence, 6 HARV. L. REV. 21, 23.

[60] Savigny's ingenious argument for the Roman doctrine as to legacies upon impossible or illegal conditions precedent is a case in point. This doctrine, based wholly, in its origin, on Roman abhorrence of intestacy at a time when the rules of law as to intestate succession were grossly inequitable, is abandoned in modern codes. See my paper in 3 Ill. L. Rev. 1, particularly pp. 5, 8, 10–11, 23.

[61] Hegel, Grundlinien der Philosophie des Rechts (2 ed.), 291 (Dyde's transl. p. 81).

abound in our judicial decisions.[62] But analytical jurists and historical jurists, who were avowed enemies of the philosophical method, have been convicted of a natural law of their own more than once.[63] So long as jurists are influenced by philosophical views of law and of legal doctrines, it is better that they hold them consciously and set them forth expressly.

On the other hand the philosophical method in the past has proved to be liable to three abuses. In common with all methods of jurisprudence, it is not unlikely to be employed in too mechanical a fashion. In philosophical jurisprudence this tendency takes

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[62] For instance in a recent judicial discussion of admission to the bar, the court, looking at the matter solely from the point of view of the individual applicant and disregarding all social interest in the matter, said: "There is a law higher in this country, and one better suited to the rights and liberties of the American people, — that law which accords to every citizen the natural right to gain a livelihood by intelligence, honesty and industry in the arts, the sciences, the professions, or other vocations." *In re* Leach, 134 Ind. 665. Another court tells us that the right to take property by will is an absolute and inherent right, not depending upon legislation. Nunemacher *v.* State, 129 Wis. 190, 198–203 (1907). Another court says that a right of privacy, the existence whereof many of our courts deny, "is derived from natural law"; that it "has its foundation in the instincts of nature . . . consciousness being the witness that can be called to prove its existence." Cobb, J., in Pavesich *v.* Life Ins. Co., 122 Ga. 190, 194 (1905). Compare Jeffers *v.* State, 33 Ga. 367; Lanier *v.* Lanier, 5 Heisk. (Tenn.) 572; the notion that "natural rights" as well as constitutional provisions limit the police power, Field, J., in Butchers Union Co. *v.* Crescent City Co., 111 U. S. 746, 762; also the notion of individual rights, apart from constitutional restrictions "beyond control of the State," Miller, J., in Loan Ass'n *v.* Topeka, 20 Wall. (U. S.) 655, 662, and of property rights "going back of all constitutions," Harlan, J., in Chicago, B. & Q. R. Co. *v.* Chicago, 206 U. S. 226, 237; the notion of a fundamental theory of legislation of intrinsic validity, to be read into constitutions, O'Brien, J., in People *v.* Coler, 166 N. Y. 1, 16, (1901); the notion of "natural incapacities" (in the event always those recognized at common law) to which the legislature cannot add new ones based merely on the *facts* of modern industrial conditions. State *v.* Loomis, 115 Mo. 307, 315 (1893); State *v.* Goodwill, 33 W. Va. 179 (1889); Frorer *v.* People, 141 Ill. 171, 186 (1892); the idea that the legislature cannot determine that certain industries which employ laborers are dangerous, announced recently by the New York Court of Appeals.

What is said by Marshall, C. J., in Fletcher *v.* Peck, 6 Cranch (U. S.) 87, as to "general principles which are common to our free institutions" having force superior to legislation, and the observations of Iredell, J., in Calder *v.* Bull, 3 Dall. (U. S.) 386, are in another category. They belong to the period of eighteenth-century natural law and represent the best thought of their time.

[63] Pollock, Oxford Lectures, 15–16 and note 1 on p. 16; Bekker, Recht des Besitzes, 6; Bergbohm, Jurisprudenz und Rechtsphilosophie, 499–500. The latter styles the philosophy of the Historical School an "anonymous natural law." Kohler styles Austin and Holland "Englischen Naturrechtler," Holtzendorff, Enzyklopädie der Rechtswissenschaft (6 ed.), I, 12.

the form of over-abstractness, of a purely abstract right and justice, which, instead of resulting in a healthy critique of dogmas and institutions or at least providing material therefor, leads to empty generalities, thus in effect leaving legal doctrines to stand upon their own basis.[64] This is doubly unfortunate in that we must rely chiefly upon the philosophical jurist to keep us in our course toward right and justice as ends. Again, the philosophical method has led often to ambiguities productive of far-reaching confusion. This has been true particularly of the ideas of natural right and natural law. Much as these ideas have done for the liberalizing of law, they have sometimes undone almost as much in their obstruction of clear juristic thinking.[65] Finally, in common with the other methods of jurisprudence, the philosophical method has been employed to work out specious reasons for doctrines, instead of to criticize them, and thus has sometimes helped to intrench them in juristic thought where a real inquiry into their ethical foundations would have shaken their authority. Such is not infrequently the result when the philosopher whose acquaintance with law is superficial, attempts to deal with concrete legal institutions and relations. He learns quickly that there is danger in criticism, and turns to ingenious justification. A notable instance may be seen in Hegel's attempt to justify the unworkable doctrine of *laesio enormis*. He says:

"By the very conception of contract a *laesio enormis* annuls the agreement, *since the contractor in disposing of his goods must remain in possession of a quantitative equivalent.* An injury may fairly be called enormous if it exceeds half the value." [66]

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[64] "For the schematism of the fundamental conceptions of law must always be filled out with some sort of content. In the days of natural law, it contained a mere pseudo-content by means of the contract theory. Legal conceptions seemed to stand upon their own basis; the form supplied the place of the content." Berolzheimer, System der Rechts und Wirthschaftsphilosophie, I, vii. See Pollock, Essays in Jurisprudence and Ethics, 28–30.

[65] Natural right, it has been said aptly, is "an ambiguous way of saying what might be less ambiguously expressed by a direct use of the term 'ought.'" Ritchie, Natural Rights, 75. See Lord Russell's remarks on the consequences of employment of the natural-law method in modern international law. International Law and Arbitration, 19 Rep. Am. Bar Ass'n, 253, 268. Also the observations of Sir William Vernon Harcourt, Letters of Historicus, 75–78.

[66] Grundlinien der Philosophie des Rechts (2 ed.), 115 (Dyde's transl., p. 80).

Both the doctrine of *laesio enormis* and the theory of a quantitative equivalent have been abandoned in modern German law.[67] Another circumstance leads to the same abuse of philosophical method. It is in human nature to accept most of the institutions with which one is familiar without much question. Hence we might reasonably expect that in any system of natural law nature would be found to dictate, for the greater part, the institutions with which the individual jurist who interpreted nature was familiar and under which he had grown up. Such has been the event. In nearly every case, for the Continental jurist of the seventeenth and eighteenth centuries, natural law meant an ideal development of the principles of the Roman law, which he knew and had studied. Similarly, for the common-law lawyer by whatever name he may call it, nature means an ideal development of the principles of the common law. Hence we find American jurists working out the applications of common law individualism after the individualist philosophy and economics have lost their momentum, and we find our courts and lawyers insisting upon views of liberty of contract, of risk of employment, and of the fellow-servant rule which are out of all relation to actual life.[68] Few juristic theories have been more barren than the eighteenth-century natural law of American judges in the nineteenth century.

4. Rise of a Sociological School. — The Social Philosophical School.

To sum up what has been said with respect to the three methods of jurisprudence, the science of law seems to begin everywhere in the attempt to distinguish cases superficially analogous and to

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[67] It is worthy of note that Langdell, proceeding analytically, uses the same principle of equivalency, in treating of conditions in contracts, to reach some obviously unjust results. Summary of Contracts, §§ 106, 109. In the event the decisions have not acquiesced in these results, and a different principle is now invoked.

[68] "We must remember that the injury complained of is due to the negligence of a fellow workman, *for which the master is responsible neither in law nor morals.*" Durkin *v.* Coal Co., 171 Pa. St. 193, 202. "At common law a servant cannot recover from his master for injuries received from a fellow servant acting in the same line of employment. This is a part of that general American common law, *resting upon considerations of right and justice* that have been generally accepted by the people of the United States." Hoxie *v.* New York, N. H. & H. R. Co., 82 Conn. 352, 359–360. See my paper "Liberty of Contract," 27 Yale L. Journ. 454.

establish categories and "differences." From this comparison of rules within the legal system, it is but a step to compare with the rules of other legal systems and to compare systems themselves. This was the theory of the *Ius Gentium*, and doubtless to some extent the practice. It is to be seen in our own law at least as far back as Fortescue,[69] and, though scorned by Coke, was well marked in the seventeenth and eighteenth centuries in the development of equity [70] and the rise of the Law Merchant.[71] The comparative tendency is followed by a philosophical tendency. Law is felt to be reason, and the "artificial reason and judgment of the law," as Coke puts it, is subjected to scrutiny. It is not enough that a rule exist in one system or that it have its analogues in others. The rule must conform to natural — *i. e.*, non-legal — reason, and if it does not, must be reshaped until it does, or must have reasons made for it. This is the dominant idea of the *Ius Naturale*. It is seen in Continental Europe in the period after Grotius. In our law, in crude form, one must confess, it is to be seen in the eighteenth and nineteenth centuries in the giving of "reasons" in which Blackstone and the lecturers on law who followed him in America were so prolific. To this philosophical tendency, an analytical tendency succeeds by way of revolt. The validity of the so-

[69] De Laudibus Legum Angliae, chaps. 19–23, 28.

[70] See Spence, Equitable Jurisdiction of the Court of Chancery, I, 413. If Spence's account is somewhat overdrawn, yet resort to the Dutch publicists is well authenticated.

[71] The effect of the growth of trade and commerce upon English law becomes well marked in the time of Lord Holt. At the same time we may note a tendency to treat the authorities of the civil law in a spirit very different from that of Coke. Lord Holt refers to the civilians and to the Roman law many times, *e. g.* Lane *v.* Cotton, 1 Ld. Raym. 646, 652; Knight *v.* Cambridge, 2 Ld. Raym. 1349; Coggs *v.* Bernard, 2 Ld. Raym. 909, 915; City of London *v.* Wood, 12 Mod. 669, 686. Counsel cited the civil law to him and his colleagues very freely, *e. g.* case of the Ambassador of Muscovy, 10 Mod. 4; Assievado *v.* Cambridge, 10 Mod. 77, 78, 79. Wooddesson, Elements of Jurisprudence, lxxix (1792), treats the law merchant as part of the law of nations. In America, the same phenomenon is to be seen in the early part of the nineteenth century. Thus in the first volume of Johnson's reports, reporting decisions of the Supreme Court of New York and the Court of Errors of New York during the year 1806, Pothier is cited four times, Émérigon five times, Valin three times, Casaregis twice and Azuni twice. The Institutes of Justinian are cited once. These citations are made by the court. In addition, counsel, so far as their arguments are reported, cite civilians (mostly French) repeatedly. In the seventh volume of the same reports, reporting decisions of the same courts during 1810 and 1811, Pothier is twice cited, Huberus twice, Émérigon once and the French civil code once. There are also two citations of the Digest, one of the Institutes and one of the Code. Almost all these citations are in cases involving questions of mercantile law.

called reasons is examined by applying them to analogous cases and by trying how far the logical scope of the reason and the extent of the rule to be explained may be squared. Being for the most part *ex post facto* and, though specious, neither historically sound nor critically adequate, they fall to the ground, and sometimes carry the rules with them. Hence the analytical period usually coincides with a critical tendency and an era of reform through legislation. Such a tendency in the decadence of Roman institutions resulted in much valuable legislation on matters of private law.[72] In Germany such a movement has overthrown the long-dominant Romanism and has brought forth a German code. In our common-law system the analytical tendency coincides with the reform movement, inaugurated by Bentham, the force of which is not yet wholly spent. Along with this analytical tendency, sometimes beginning before it, sometimes after, but as another phase of the revolt from the philosophical, there is an historical tendency. How far we see something of this in the classical Roman law, — in Gaius, for example,[73] — need not be considered. It preceded the analytical tendency in Germany, it followed that tendency in France. In England it seems to have followed. In either event, it completes the exposure of the specious explanations of the preceding period and insures the overthrow of pseudo-philosophy. This done, there is room, and often need for a true philosophical jurisprudence, since the analytical and historical methods, pursued exclusively, lead to the setting up of fixed, arbitrary, external standards and an over-development of the mechanical. On the whole, we may say that analytical jurisprudence is attaining the best results in the present, that historical jurisprudence has accomplished most in the immediate past, and that philosophical jurisprudence, which had been most fruitful from the Reformation till the nineteenth century, but was sterile

[72] See for example the preamble to Cod. VII, 25.

[73] " . . . I have as a matter of course thought it right to go back for my account of the law of the Roman people to the foundation of the city . . . because I observe that in all subjects a thing is only perfect when it is complete in all its parts, and undoubtedly the most essential part of anything is its beginning. Besides this, if with men who are arguing cases in the forum it is, so to speak, a monstrous thing to set the matter forth to the judge without first making some introductory statement, how much more unsuitable must it be for one who has undertaken to give an exposition to disregard the beginning and omit references to historical causes. . . ." Gaius, on the Law of the Twelve Tables, 1, in Digest, I, 8, 1 (Monro's transl.).

during that century, shows signs of regaining its usefulness and reacquiring its former importance in the immediate future. But with the rise and growth of political, economic and social science, even in the closing years of the nineteenth century, the time was ripe for a wholly new tendency, and that tendency, which may be called the sociological tendency, has become well established in Continental Europe.[74]

The first movement in the new direction was from the then dominant historical school in Germany. The Historical School began by applying historical method to the modern Roman law. Next arose a tendency to investigate the legal institutions of all Aryan peoples and to attempt reconstruction of an Aryan *Urrecht* in which the roots of modern law were to be found.[75] At the same time, while the latter movement was in progress, the scope of inquiry widened, an ethnological turn was given to historical jurisprudence, and the foundations of what Kohler styles universal legal history (*Universalrechtsgeschichte*) began to be laid. At first this wider historical jurisprudence was thought of as a comparative ethnological jurisprudence.[76] But it was not long in assuming the name and something of the character of a sociological jurisprudence.[77] The triumph of the Germanists and consequent relegation of Roman law to a distinctly lower position in German legal education began to be felt in turning the energies of jurists and scholars into wider fields of historical research, and a new type of juristic literature, dealing with the legal institutions of all manner of peoples from the comparative [78] and historical standpoints grew to considerable proportions.[79] Even Romanists were affected,

[74] Vaccaro, Les bases sociologiques du droit et de l'état (1898); Vanni, Lezioni di filosofia del diritto (1902, 8 ed. 1908); Stammler, Wirthschaft und Recht (1906); Ehrlich, Soziologie und Jurisprudenz (1906); Grasserie, Les principes sociologiques du droit civil (1906); Gumplowicz, Allgemeines Statsrecht (1 ed. 1877, 3 ed. 1907); Demogue, Les notions fondamentales du droit privé (1911); Duguit, Le droit social, le droit individuel et la transformation de l'état (1 ed. 1908, 2 ed. 1911); Rolin, Prolégomènes à la science du droit (1911). See Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, § 44.

[75] The best examples are: Leist, Altarisches Jus Gentium (1889), and Altarisches Jus Civile (1892).

[76] Post, Bausteine für eine allgemeine Rechtswissenschaft, (1880) I, § 1.

[77] Post, Grundlagen des Rechts (1884). In this work there is an avowed attempt to put jurisprudence on a sociological basis.

[78] Meili, Institutionen der vergleichenden Rechtswissenschaft (1898).

[79] The head and front of this comparative jurisprudence was Kohler: Shakespeare

and deemed it necessary to begin a history of Roman law by an investigation of the legal institutions of Babylon.[80]

Meanwhile others had been approaching the same position from the philosophical side. Dahn in 1878, reviewing one of Post's earlier works, said emphatically that a "scientific philosophy of law must be based upon comparative legal study" and that philosophical jurists must not forever draw their materials from the Roman law and certain phases of German legal development, but must make use of the legal life of all peoples.[81] In another paper, reprinted 1883, he foreshadowed the treatment of the conception of law now characteristic of German jurists.[82] The latter lay stress upon the legal order, attained through law, toward which law is a means, and seek to define that legal order rather than to reach a definition of law. Dahn defined law, indeed, but he defined it as an institution of society. A little later Nani,[83] writing in Italy, where the Philosophical School is still paramount, rejected both the historical and the natural-law standpoints, and ranged himself with Dahn, declaring that comparative ethnology and anthropology must be the basis of jurisprudence. These attempts to broaden the philosophical foundation, like the attempts to broaden the historical position which went on at the same time, go along with the earlier stage of social science, before Ward had made it clear that psychology was no less fundamental for sociology than anthropology and ethnology. Wallaschek attempted to

vor dem Forum der Jurisprudenz (1884); Rechtsvergleichende Studien über islamitisches Recht, etc. (1889); Zur Urgeschichte der Ehe, etc. (Zeitschrift für vergleichende Rechtswissenschaft, XII, 187–353). See a note of his papers on various topics of comparative ethnological jurisprudence in Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, 405, n. 3. Next stands Post, Die Geschlechtsgenossenschaft der Urzeit und die Entstatsung der Ehe; Beitrag zu einer allgemeinen vergleichenden Staats- und Rechtswissenschaft (1875); Ethnologische Jurizprudenz (1880); Studien zur Entwickelungsgeschichte des Familienrechtes; Beitrag zu einer allgemeinen vergleichenden Rechtswissenschaft auf ethnologichen Basis (1890); Über die Aufgaben einer allgemeinen Rechtswissenschaft (1891). See also Willutzky, Vorgeschichte des Rechts (1903). Compare a similar tendency in the English Historical School to broaden the foundation of historical jurisprudence by a "method of inductive generalization on the basis of historical and ethnographical observation." Vinogradoff, The Teaching of Sir Henry Maine, 18. This conception is approved by Professor Lefroy, Jurisprudence, 27 L. Quar. Rev. 180.

[80] Ehrenberg, preface to Jhering, Vorgeschichte der Indo-Europäer, vi (1894).

[81] Zur Methode der Rechtsphilosophie, Rechtsphilosophische Studien, 288.

[82] Rechtsphilosophische Studien, 119.

[83] Vecchi e nuovi problemi del diritto (1886).

broaden the philosophical position by approach to the analytical standpoint. He asserted that the philosophy of law is "the science of juristic thought" and insisted that it was to be found in the actual methods of jurists.[84] Here again, however, Kohler has been the leader. Professing to follow Hegel, but in reality, perhaps, merely taking his clew from a remark of Hegel's that right and law are phenomena of culture, he developed and limited the new movement in philosophical jurisprudence so as to set off the philosophy of law from history and anthropology on the one hand and from analysis of matured systems of law on the other, and yet give it an intimate relation to each.[85] He defined its province as philosophical study of the evolutionary processes by which law is formed. Thus in his view historical and philosophical jurisprudence are merged in a social-philosophical jurisprudence, and lose their identity.

No doubt the movement was accelerated by the influence of the comparative idea in other branches of learning. In the latter part of the nineteenth century great things were expected from this method on every hand. Freeman went so far as to say that "the establishment of the comparative method of study has been the greatest intellectual achievement of our time." [86] For a time it was thought that the comparative method in jurisprudence would supersede all others, and exaggerated claims are still made for it.[87] But the analytical and historical methods, so far as they are methods of jurisprudence, must be comparative. Legal history, the discovery and exposition of the actual course of development of a particular legal system or of a particular doctrine in a particular system, is not historical jurisprudence. The English analytical and historical schools used the comparative method from the beginning. On the Continent, the Germanic law had been arrested

[84] Studien zur Rechtsphilosophie (1889). See especially p. 107. Schuppe carried this even further. Rechtswissenschaft und Rechtsphilosophie, Jahrb. der internationale Vereinigung für vergleichende Rechtswissenschaft, I, 215 (1896).

[85] See in particular Rechtsphilosophie und Universalrechtsgeschichte (in Holtzendorff, Enzyklopädie der Rechtswissenschaft (6 ed. vol. I), 9, 14, 17, 20 (1902).

[86] Comparative Politics, 1 (1873).

[87] Bryce, Studies in History and Jurisprudence, Lect. XII; Kohler, Rechtsphilosophie und Universalrechtsgeschichte (in Holtzendorff, Enzyklopädie der Rechtswissenschaft (6 ed. vol. 1), 14. See Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, 21; Schuppe, Die Methoden der Rechtsphilosophie, Zeitschrift für vergleichende Rechtswissenschaft, V, 209.

in its development in the fourteenth and fifteenth centuries. Hence at first there was not the stimulus to comparison with another matured system which was at hand in England. Moreover, Continental jurists, living under a system which showed a continuous written history extending back almost to the Twelve Tables, had to do with a body of law four times purged of its archaisms, whereas in England in the middle of the nineteenth century, with but six centuries of legal history as a system, the law was overhauling for the second time, in the legislative reform movement, in the endeavor to rid it of the *incubus* of the past. Thus there was every reason for the English historical jurist to look into the development of another system, older than his own, which had passed through the stages of remarking by equity and by legislation and to consider archaic systems analogous to that out of which his own had developed at a period by comparison so recent. For the same reason, when Continental jurists began to employ comparative methods, the change appeared revolutionary. But the result has been simply that historical and philosophical methods are now employed comparatively. There is a more scientific use of the old methods rather than a new method. Indeed, a purely comparative method, apart from analysis or history or philosophy, would be barren. Savigny said of a like notion that the task of the Continental jurist should be to compare the practical rules of the classical Roman law with those worked out on a Roman basis in the Middle Ages and in modern Europe:

> "A few isolated cases excepted, the matter lies too deep to admit of being disposed of by such a selection between contrasted practical rules, and a work which sought to carry out this comparative point of view into particulars, would remind one of the frame of mind of a child, who, when the histories of battles are related to him, is always inclined to ask which were the good and which the bad." [88]

Using the term in a broad sense to include all jurists whose methods are primarily or avowedly philosophical, it was suggested at the outset that the Philosophical School on closer scrutiny fell into three. These three groups represent the philosophy of law of the eighteenth, nineteenth and twentieth centuries respectively. Rousseauists in France and in America, publicists of the older type in

[88] System des heutigen römischen Rechts, I, preface (Holloway's transl., p. vii).

America, and Anglo-American lawyers bred on the introductory chapters of Blackstone make up nearly the whole of the first group. The second group, the Metaphysical School, has modern representatives in Scotland,[89] in Italy,[90] in France,[91] and possibly in a few Krauseans and a few Hegelians in Germany.[92] The third group, which may be called the Social-Philosophical School, presents three types, the so-called Neo-Kantians, who, on the whole, are philosophical and sociological in tendency, the teleologists or social utilitarians, whose tendency is analytical and sociological, and the Neo-Hegelians, who may be described as historical and sociological in tendency. In other words, just as historical jurists are now of two types, the one historical in the older sense, the other sociological, philosophical jurists also are to be recognized as natural-law or metaphysical on the one hand, or social-philosophical (sociological) on the other hand. It is not easy to perceive any real distinction between the advanced types of the two schools. What difference there is comes from the starting-point from which they came to the positions they now occupy. As we understand the term in America, they are more truly sociological in method than many of those who avow themselves adherents of a sociological school. The reason why the former do not call themselves a sociological school may be found in a remark of Professor Small:

" . . . German social science has always carried in solution so much of the assumption of the inter-connection of all human experience — so much more than is in French or English thought — that the Germans did not feel the need of crystalizing this fluid sociology. The Germans

[89] *E. g.* Herkless, Lectures on Jurisprudence (1901).

[90] Del Vecchio, Il concetto della natura ed il principio del diritto (1908). Ardigo, in the last quarter of the nineteenth century, founded a school of positivist natural law which has many adherents in Italy. See Di Carlo, Il diritto naturale secondo R. Ardigo ed il positivismo italiano (1909); Puglia, R. Ardigo ed il moderno positivismo etico giuridico italiano (1898).

[91] Boistel, Cours de philosophie du droit (1899), deducing a whole system from a principle of respect for personality. See also Lagorgette, Le fondement du droit (1907); Fouillée, L'Idée moderne du droit (1878, 6 ed. 1909). The "natural law with variable content" of recent French philosophers of law, who stand for equitable application of legal rules and a free science of law, has only a historical connection with the Metaphysical School. It will be considered in connection with the several types of the Social-Philosophical School.

[92] Hegel's Philosophy of Law was revived by Lasson, System der Rechtsphilosophie (1882). See also Rundstein, Aus der holländischen Rechtsphilosophie, Archiv für Rechts und Wirthschaftsphilosophie, II, 291.

thought, and as a rule still think, that an independent formulation of the interworking of all human experience would be a redundancy in science. There is also more excuse for this position in Germany than elsewhere because, with all their separateness, the different social sciences have come nearer in Germany than anywhere else to co-operation as divisions of a single science." [93]

Consideration of the relation of the Positivist School to sociological jurisprudence must be deferred until the different types of the Social-Philosophical School have been examined more critically.

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[*To be continued.*]

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[93] The Meaning of Social Science, 82.

UNRECORDED CONDITIONAL SALES IN BANKRUPTCY.

TWO of the most important decisions of the United States Supreme Court, construing the Bankruptcy Act, are Hewit *v.* Berlin Machine Works, and York Manufacturing Co. *v.* Cassell.[1] In each of these cases the trustee in bankruptcy of a conditional vendee was not allowed to take the property conditionally sold as assets though the conditional sale had not been recorded prior to the bankruptcy. The New York and Ohio statutes which were in question in effect provided that as between the parties the transaction was good though unrecorded, but that any creditor might, at any time while the transaction was not recorded, seize the property for the payment of his debts. The later decision has previously been criticized in this Review.[2] The cases were contrary to the weight of authority prior to their decision and seem to have disregarded certain provisions in the Bankruptcy Statute. The Court said, in the later case quoting from Thompson *v.* Fairbanks,[3] that "under the present Bankrupt Act the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt." And such was the effect of Hewit *v.* Berlin Machine Works. But § 67 *a* of the statute provides that "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate." These words presumably mean something, and the only lien which habitually requires record is the lien of a mortgage. A conditional sale is in effect, though not in form, a chattel mortgage. It seems a very forced construction of this language of the statute to say that an unrecorded mortgage or conditional sale is a "valid lien" against creditors until they have actually seized the property. Until they have seized it the creditors, to be sure, have no lien

[1] 194 U. S. 296 and 201 U. S. 344.
[2] 16 HARV. L. REV. 370.
[3] 196 U. S. 516.

upon the property; but it would seem that the mortgagee or conditional vendor also has not a valid lien. If, however, these words are of doubtful meaning, a provision of § 70 *a* (5) ought to dispel any doubt. This clause provides that the trustee shall be vested by operation of law with all "property which prior to the filing of the petition he [the bankrupt] could by any means have transferred or which might have been levied upon and sold under judicial process against him." It seems impossible to contend that property which is subject to mortgage, or title to which has been retained by a conditional sale, could not have been transferred by the bankrupt or levied upon and sold under judicial process against him, in any jurisdiction where any recording act as to such instruments exists. In Hewit *v.* Berlin Machine Works the court quoted this provision of the act, but held its meaning is merely that the trustee succeeds to the bankrupt's title. The statute certainly says more than that.[4] The decisions of the Supreme Court on the point have seemed so questionable that in some cases they have not been followed.[5] Courts have professed to distinguish the state recording statutes involved in the cases before them from the statutes involved in the decisions of the Supreme Court. This was done by the District Court for the District of Connecticut in the recent decision of *In re* Faulkner, 25 Am. Bkcy. Rep. 416. In fact, however, the statutes, on proper construction, of almost all states mean the same thing; namely, that unless record is made, a creditor may seize the property; that until such seizure he has no lien upon the property; and that the transaction though not recorded is binding as between the parties to it.

If, indeed, a statute can be construed as making an unrecorded transaction so far fraudulent or void that any creditors, or any creditors whose claims are incurred subsequent to the transaction and before record, acquire thereby a permanent right to attack the transaction irrespective of record or change of possession before judgment or seizure by the creditor, doubtless the statute is more than an ordinary recording act, and is also an act to prevent fraudulent conveyances. Such was the construction for a time put on the Kentucky statute governing both conditional sales and chattel mortgages, though this construction has not finally prevailed.[6]

[4] See also § 70 *e*.

[5] Collier, Bankruptcy, 8 ed., 762–766.

[6] See *In re* Lausman, 25 Am. Bkcy. Rep., 186.

Such is the construction put upon the New York statute, governing chattel mortgages, but not upon that governing conditional sales.[7] As to such sales, at least, the common form of statute is not more stringent than the New York law. Since the decisions of the Supreme Court in Hewit *v.* Berlin Machine Works and in York Manufacturing Co. *v.* Cassell had not met general approval, those who framed the amendment of 1910 to the National Bankruptcy Act planned to effect a change in the law laid down in those decisions. This appears from the report of the Committee on the Judiciary of the House of Representatives reporting the bill, which ultimately passed as that amendment. The provision designed for the purpose cannot be considered as wholly fortunate. In the first place the provision is enacted as an amendment to § 47 *a* (2). § 47 relates to the duties of trustees; and the second clause of subdivision *a* provides that trustees shall reduce to money the property of the bankrupt estate and close it up as expeditiously as possible. There was never any question and never could be any question that under this clause trustees were bound to reduce to money all property to which they were legally entitled. The question of the property to which they were legally entitled was dealt with in the statute under § 70 and also under § 67 (which, by avoiding certain liens, in effect enlarged the scope of the property which came into the trustee's hands). Any amendment which was designed to give to the trustee property which had been conditionally sold to the bankrupt or had been mortgaged by him, but had not been recorded, should properly have been made to § 67 or § 70. An element of doubt and confusion is introduced by inserting the amendment elsewhere. Moreover, the amendatory act provides that it shall not apply to bankruptcy cases pending when the act took effect. This seems to imply that its provisions shall apply to all bankruptcy proceedings begun after the passage of the act. Such a construction leads, however, in some cases to a retroactive operation of the statute which, if not unconstitutional, at least seems opposed to correct theories of legislation. For instance, an unrecorded conditional sale made prior to the passage of the amendment was good under the decision of York Manufacturing Co. *v.* Cassell against supervening bankruptcy. The

[7] Skilton *v.* Codington, 185 N. Y. 80.

amendment if naturally construed invalidates subsequently the sale against such a bankruptcy. This matter was referred to in *In re* Lausman,[8] but as the court held the conditional sale there in question governed by other considerations, it added: "We do not deem it necessary to discuss the question of the constitutionality of the amendment of June 25th, 1910, as applied to this case, nor whether that amendment can be given a retroactive operation."

Another difficulty in the construction of the amendatory act relates to the determination of the meaning of the words "custody of the bankruptcy court." The amendment provides that as to property in the custody of the bankruptcy court, the trustee shall have the rights of a creditor holding a lien by legal or equitable proceedings, but as to property not in the custody of the bankruptcy court the trustee is vested with the rights of a judgment creditor having an execution return unsatisfied. Is the bankruptcy court to be regarded as having constructively custody of all property in the hands of the bankrupt at the time a petition in bankruptcy is filed? Or, has the word "custody" a narrower meaning? Bankruptcy decisions as yet do not throw light on this point.[9]

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[8] 25 Am. Bkcy. Rep. 186, 189.

[9] See Foster's Federal Practice, § 9, on the general question when the custody of a court begins and ends.

STATE CONTROL OF PUBLIC UTILITIES.[1]

I.

THE difference between public callings and private business is a distinction in the law governing business relations which has always had, and will always have, most important consequences. Those in a public calling have always been under the extraordinary duty to serve all comers, while those in a private business might always refuse to sell if they pleased. So great a distinction as this constitutes a difference in kind of legal control rather than merely one of degree. The causes of this division are, of course, rather economic than strictly legal. And the relative importance of these two classes at any given time, therefore, depends ultimately upon the industrial conditions which prevail at that period. Thus in the England which we see through the medium of our earliest law reports the mediæval system with its established monopolies called for the legal requirement of indiscriminate service from those engaged in almost all employments. There followed in succeeding centuries an expansion of trade which gradually did away with the necessity for coercive law. Indeed in the early part of the nineteenth century, free competition became the very basis of the social organization, with the consequence that the recognition of the public callings as a class almost ceased. It is only in very recent years that it has again come to be recognized that the process of free competition fails in some cases to secure the public good. And it is now reluctantly admitted that state control is again necessary over such lines of industry as are affected with a public interest. Thus with varying importance the distinction between the public callings and the private callings has been present in our law from the earliest times to the present day.

[1] Copyright, 1911, by Bruce Wyman — being in large part the Preface to Wyman on Public Service Corporations, reprinted by permission of Baker, Voorhis & Co.

II.

Some restraint has always been exercised over such lines of industry as are of vital interest to the public. The establishment of the peace, the protection of the weak against the physical violence of the strong, is a fundamental function of government; but of equal importance and of almost equal antiquity is the protection of the common people against the greed and oppression of the powerful. In matters not vital to the life and well-being of mankind the laws of society may be left free to operate without limitation by the sovereign power; but in all that has to do with the necessaries of life the protection of the sovereign is extended. The modern state protects equally against physical violence and against oppression that affects the means of living.

As a result of an economic evolution there have come into being in the last generation a considerable number of employments which have gained, if not a legal monopoly, at any rate, as a result of circumstances, a virtual monopoly in matters of public necessity. The positive law of the public calling is the only protection that the public have in a situation such as this, where there is no competition among the sellers to operate in their favor. So much has our law been permeated with the theory of *laissez faire*, which was but lately so prominent in the policy of our state, that the admission has been made with much hesitation that state control is ever necessary. But the modern conclusion, after some bitter experience, is that freedom can be allowed only where conditions of virtual competition prevail, for in conditions of virtual monopoly, without stern restrictions, there is always great mischief.

It has been remarked many times that the common law may be relied upon to meet, by the continual development of its fundamental principles, the complex conditions created by the constant evolution in the industrial organization. One of the most striking of modern instances of this capacity of growth in the common law is the astonishing progress in the working out of the detail of the exceptional law governing the conduct of public callings. In recent times there undoubtedly is an increasing need of this stricter regulation of all employments which appear to be affected with a public interest. Great power brings as its consequence the need of control of that power for the good of the whole people.

III.

Whether a business is public or not depends in last analysis upon the situation of the public with respect to it. Are there enough of such purveyors to serve the public? or are there, for permanent reasons, never enough? If so, there will be virtual competition; if not, there will be virtual monopoly. It will be found that, in all such businesses, competition, although from a legal point of view possible, is from the economic point of view improbable. So far as one can see, virtual competition is at an end in these industries, and virtual monopoly will henceforth prevail. Therefore it must be said that the public has now an interest in the conduct of these businesses by their owners. They are affected with a public interest, since these agencies are carried on in a manner to make them of public consequence. Therefore, having devoted their property to a use in which the public has an interest, they in effect have granted to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest they have created. Plainly we have in the accepted use of these phrases the manifestation of a deep-seated change in habits of thought. Only twenty-five years ago the general feeling as to every sort of industrial relation was that it was better to leave all alone, that it was better to leave people to work out their own salvation. But of late years we have been calling upon the state to save us from monopoly in all its forms; and we are impatient if it delays.

The present situation is plain enough to all of us. Whatever way we turn we depend upon a service that is public in character. Not only in long travels but in short journeys we employ common carriers — railroads and steamships, coaches and cabs, street cars and omnibuses, the subway car and the elevated train. If we ship goods there are various transportation services at our disposal beside railroads and ships, such as express companies and dispatch lines, refrigerator lines and tank lines. If we are journeying ourselves we eat at hotel restaurants, and put up at public inns, or travel in palace cars and lodge ourselves in sleeping cars. Our freight in its transit has its needs attended to — for our goods, warehouses, for our grain, elevators, for our cattle, stockyards, and

for our exports, docks. In almost every community, even relatively small, we have for our household needs gas, electricity, water supply and sewerage service provided for us, usually, except the last two, by private companies in public service, but even where the service is provided by the municipality it is subject to the same law governing public service. For speedy communication in our business and pleasure, we have the telephone and telegraph in common use, and ticker-service and messenger call for special needs. One may judge by this incomplete list how common to every part of our modern life are the various public services, and how necessary it is that they should be required by law to serve us all with adequate facilities for reasonable compensation and without discrimination.

IV.

The spirit of our present age demands that these great business enterprises shall be conducted in accordance with the requirements of society. The present program of organized society is to see to it that those who have gained a substantial control of their market shall not be left free to exploit those who look to them to supply their needs. Men now see clearly that freedom of action may, even in the industrial world, work injuriously for the public; and it must then be restrained in the public interest. We have seen the results of unrestrained power; and we no longer wish those who have control over our destinies left free to do with us as they please.

While state regulation is the prevailing philosophy of the people at the beginning of the twentieth century, it must be borne in mind that this has been the result of a gradual progress of thought, and that this progress has not affected all men equally. Now, as at all times, there are conservatives and radicals, the former as far behind the prevailing spirit of the time as the latter go beyond it. In every change of popular thought there have been those who have been unable to appreciate the change; and in every such change there have been those who are unable justly to estimate the true meaning of the change.

Many persons still hold conservative views as to the application of the law of public callings to modern conditions. They believe

that the conductors of every business, however necessary to public welfare, should do whatever seems good in their own eyes. But the most of men appreciate that the law has already taken control of the situation for all time. It is hardly too much to say that the efficient regulation of the public employments by sufficient law is the most pressing problem confronting this nation; and it must be met without further hesitation.

V.

In this crisis of affairs the people must be assured that the law is adequate to deal with the situation, that it has not only elaborated detail to meet obvious wrongs seldom defended, but also enlightened comprehension to deal with the large policies openly justified, which are truly inconsistent with public duty. That those who profess a public employment owe the utmost public service should be generally accepted as the fundamental principle upon which the law governing public employment is to be based. It is not agreed, however, how far this principle should be pressed; there is a clash of interests here, and there is an inclination on the part of those who conduct the public services to contest every issue. This is not even an enlightened selfishness.

The time has come when extension of the law and enforcement of it should be the avowed attitude of all conservative persons who wish the perpetuation of present conditions. It would be well, therefore, if the restless and the doubting who see many abuses and many wrongs in the conduct of our public services without prompt remedy or adequate redress, might be relieved and heartened by being shown that the common law is adequate to deal with all real industrial wrongs, and that with the aid of remedial statutes the administration of the law can be relied upon. The proprietors of the public services should be told sharply that they may not adopt, to the prejudice of their public, various profitable policies, and then justify them as inherent rights which other men in ordinary business may use in the advancement of their interests.

There is now fortunately almost general assent to state control of the public service companies. Two ways only can be found to exercise such control. One way, that advocated by the most radical

statesmen, is the government ownership and operation of these services. The other way, which is in fact the conservative method of dealing with the problem, is the control of the rates and practices of the utilities for the public good. One or the other of these methods must be finally adopted. The conservative method is now on trial. It behooves the lawyers to see to it that it be so intelligently tried, and that the law applicable to the case be so accurately enforced, that we may not be driven perforce to the radical alternative of public ownership.

VI.

All businesses both public and private are subject, to be sure, to that general police power of the state whereby in any civilized society the effort is made so to order things that one may not use his own so as to injure another. But the comparison of the large amount of regulation which it is considered proper for the state to impose in regard to public services with the small amount of regulation which it is considered proper for the state to enforce in regard to private business is in itself significant enough. The difference which is shown is more than one of degree, it becomes one in kind. It is only in public business that the law imposes affirmative duties; generally speaking, the duties imposed upon those in private business are negative. The law says to those in public business you must do this for this applicant, and you must do it thus. To those in private business it says you must not do this, or if you do this you must do it thus. This is the chief distinction between public calling and private calling.

General principles may now be developed and corollaries to them established by the use and with the co-ordination of cases from a variety of public employments. Not only are the fundamental principles true as to all public employments — that all must be served, adequate facilities must be provided, reasonable rates must be charged, and no discriminations must be made. But also in dealing with the minor detail of these principles, cases from one service will be found in point in another — as to what conditions there are precedent to service, what will excuse failure in provision of facilities, what is a proper basis for calculating rates and what differences constitute discrimination. This is the way our law grows, by break-

ing down the partitions between departments of the law which have been built up separately. The public service law has at length reached a stage of development in which it may be possible to state its principles with some degree of confidence. It is only within the last few years that it would have been within the range of possibility to do this.

Twenty-five years ago the public services that were recognized were still few, and the law as to them imperfectly realized. It was known from olden times that those who professed a public employment must serve all at a reasonable rate. As to the duty to serve, it was recognized that there were certain excuses. As to the restriction to reasonable rates, there was no standard unless, indeed, the customary charge. But the important duty to provide adequate facilities had hardly advanced beyond the general law as to negligence. And the duty not to discriminate, which according to present ideas is the most important of all, was denied altogether by the weight of authority. Even ten years ago when these four obligations had become generally recognized, the details as to them in regard to any particular employment had been worked out only in very fragmentary manner; but at the present day it is just being appreciated that rapid progress may be made by the general recognition of the unity of the public service law, whereby cases as to one calling may be used to show the law in all. It is only in our present day that the attempt to treat the public service law as a consistent body of law could be made with any hope of success.

VII.

As time goes on, one finds himself almost among the conservatives in standing by the original program for state control. And yet one may still hope that the state will as far as possible confine itself to regulation, leaving the companies to work out their own problems of management. State control need seldom go further than regulation in this sense. Whatever the companies may do should be subject to immediate revision by the constituted authorities. There should be swift reparation provided for any individual who has suffered harm in the meantime. And that should be the full extent of governmental regulation, generally speaking. When the state

goes further, and attempts to dictate as to the policies which the companies shall adopt, it usually goes too far. Legislation going to this extent really crosses the line which divides state control from state operation.

It has been said above that there are two general ways of dealing with the problem—state control and state operation. Few would stand out for uncontrolled action without state supervision; few would believe in the permanence of state ownership combined with private operation. We must choose between state control which we know about and state operation with its unknowable consequences. The restriction which the federal government has thus far put upon itself in regulating interstate carriage is well advised. The Interstate Commerce Commission still has virtually only the power of revision. In some of the states, however, the commissions are virtually given the power to determine of their own motion what the carrier shall do for the public. This imposes government operation, without relieving the railroad from its responsibilities in any way.

This does not mean that everything shall be left to the discretion of the companies, as the conservatives claim. Discretion should be left to the companies, but it should be made clear that this discretion may be abused. Although the companies should be left as free as possible to work out their own problems within the law, they should be warned that they must not go outside the limits which the law is fixing. For example, the railroad people once claimed the right to make such rates as it seemed to them would be for the best interests of all concerned. But so long as this power is left in the hands of the railway management without power of review by any authority upon any fundamental principle, it is in the hands of the railroad officials to build up an artificial market where the natural conditions are adverse, or to turn an industrious city into a wilderness again. It is believed that these are too great powers to intrust to private hands without governmental control based upon some recognized standards. Indeed the public law in this, as in the other cases, should put sufficient limitations upon any business policy, however profitable, which comes in conflict with the fundamental principle of equal service to all.

VIII.

The whole problem of the regulation of public utilities has been seen more steadily of late years. It has been appreciated that in dealing with a public service company the state is really dealing with a private business concern, however many the obligations may be which it owes to the public. The risks its proprietors run are such that their financial management should be left to them, unless they be shown to be taking profit with outrageous disregard of their public obligations. With these broader views, it would be surprising if more consideration were not paid to the rights of the owners of public services. Perhaps for the moment there is danger that in emphasizing their duties their rights may be forgotten. That the courts are approaching this great issue of state control with the enlightened policy of fair compromise of conflicting interests is plain. Regulation of public service corporations, which perform their duties under conditions of necessary monopoly, will occur with greater and greater frequency as time goes on. It is a delicate and dangerous function, and ought to be exercised with great caution. Our social system rests largely upon the basis of private property, and that community which seeks to alter this will soon discover its error in the disaster which follows.

But no one who is inspired to any degree by the spirit of the age would entertain the suggestion that we ought to work to turn the law back to that time twenty-five years ago when those who had the control of public utilities were, by a failure to apply the law promptly, left to deal with their public as they pleased. The most of us of this generation not only believe in state control of the public employments, but in its enforcement so far as it is necessary. For liberty does not mean to men at the beginning of the twentieth century what it meant to men at the beginning of the nineteenth century. When the theory of *laissez faire* prevailed it meant liberty for the individual to do as he pleased with his own. To-day we know that in order that a man shall be free he must be protected from those who would do with him as they please. In order to protect the individual from the abuse of their power by others, we know that there can no longer be freedom of action for those who have gained undue power. We are beginning to appreciate that paradox which has come down to us from the sages of old, that liberty is not

to be had without restraint. In a modern state we are no longer content in seeing that the weak are safe from the violence of the strong. Not until the people generally are protected from the oppression of those who control their destinies will there be real liberty.

IX.

We are just entering upon a great and important development of the common law. Enormous business combinations, virtual monopolization of the necessaries of life, the strife of labor and capital, now the concern of the economist and the statesman, may prove susceptible of legal control through the doctrines of the law of public callings. These doctrines are not yet clearly defined. General rules, to be sure, have been established, but details have not been worked out by the courts; and upon the successful working out of these details depends to a large extent the future economic organization of the country. Only if the courts can adequately control the public services in all contingencies may these businesses be left in private hands.

This principle of state control does not lead one to socialism; indeed, it saves one from socialism if truly understood. It is only in those few businesses where the conditions are monopolistic that dangerous power over their public has been attained by those who have the control. In most businesses the virtual competition which prevails puts the distributors at the mercy of their public. In current opinion the recognition of this distinction is manifest. Men are as eager for an open market as ever; but they wish the control of monopoly to insure it. The demand is for freer trade where competition prevails and stricter regulation where monopoly is found. So long as virtual competition prevails there is no necessity for coercive law, since there is then no power over the purchasing public. But where in any business virtual monopoly is permanently established the people will not be denied in their deliberate policy of effectual regulation of such public services for the common good.

Only to this extent the individualistic ideal of society gives place to the collectivist policy. It is with true appreciation of the real issue that we are contending for state control to gain individual liberty. It may once have been the ideal of industrial freedom that

a man might do as he pleased with his own; in any event that is no longer our notion of social justice. It is believed now that with increase in power over the particular market comes increase in responsibility to the dependent public. Socialism would destroy all private interests in the name of the public; regulation would preserve private interests by reconciling them with public right. Socialism attacks all capital to whatever business it is devoted; regulation grapples with monopoly only when it is convinced that there is no other way to safeguard the interests of the public.

X.

So far as one can judge, the future holds no possibility of the coercive regulation of the conduct of all businesses, which it is apparent would be one form of socialism. Regulation of this extreme sort will be confined to those businesses which are affected with a public interest. It is, however, certain that the other businesses than those now within this classification will be brought within it. Indeed, the generalization must have occurred to the reader that all businesses which have a virtual monopoly firmly established in the nature of things, are so affected with a public interest as to be within the class of callings which are considered public employments. What branches of industry will eventually be considered of such public importance as to be included within the category of public callings it would be rash to predict. But no one can study the authorities on this subject without feeling their great potentialities. In private businesses, one may sell or not as one pleases, manufacture what qualities one chooses, demand any price that can be gotten, and give any rebates that are advantageous. It is because the modern trusts are carrying on a predatory competition under the cover of this law that we have the trust problem. All this time in public businesses one must serve all that apply without exclusive conditions, provide adequate facilities to meet all the demands of the consumer, exact only reasonable charges for the services that are rendered, and between customers under similar circumstances make no discriminations. If this law might be enforced against the trusts, perhaps a solution of the problem would be found.

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THE SOURCE OF AUTHORITY TO ENGAGE IN INTERSTATE COMMERCE.

BY the federal Constitution Congress is empowered "to regulate Commerce with foreign Nations [1] and among the several States." For reasons that we shall not pause to elaborate, we assume that the word "commerce," as here used, is substantially synonymous with "transportation," including transportation of persons and property.

Neither the Commerce clause, nor any other provision of the Constitution, specifically empowers Congress to confer authority to engage in interstate commerce or transportation. Probably it is obvious, even to laymen generally, that as a rule it is unnecessary to apply to Congress, or, for that matter, to any other governmental authority, for permission to engage therein. If I desire to travel, that is, to transport my person, either afoot, or by wagon, from a point in Connecticut to a point in New York, I no more think of so applying, than if I desire to travel between points both in New York, or to engage in manufacture or sale. The same is true if I desire to transport property, as, for example, articles of food or clothing.

This fundamental right of transportation between points in different states, as well as between points in the same state, we shall find to have been in existence long before the Commerce clause or, indeed, any constitutional or statutory provision. In Hoxie *v.* N. Y., N. H. & H. R. Co.[2] it was said by Baldwin, C. J., in a well-considered opinion:

"The right to engage in commerce between the States is not a right created by or under the Constitution of the United States. It existed long before that Constitution was adopted. It was expressly guaranteed to the free inhabitants of each State by the Articles of Confederation, and impliedly guaranteed by Article 4, § 2, Const. U. S. as a privilege inherent in American citizenship."

[1] For the sake of additional clearness, this discussion does not specifically include "commerce with foreign Nations," though largely applicable thereto.

[2] 82 Conn. 352, 364 (1909).

This language seems fully justified by the authorities. It was said by Marshall, C. J., in Gibbons *v.* Ogden:[3]

"In pursuing this inquiry at the bar, it has been said, that the constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The Constitution found it an existing right, and gave to Congress the power to regulate it."

So too it has been said:

"Right of intercourse between State and State was a common-law privilege, and as such was fully recognized and respected before the Constitution was formed. Those who framed the instrument found it an existing right, and regarding the right as one of high national interest, they gave to Congress the power to regulate it."[4]

This right of transportation between points in different states, seems, like that of transportation between points both in the same state, or that of manufacture or sale, one independent of interference under governmental authority, whether that of Congress or of the states, as well as of interference by mere individuals. Certainly nothing can be better established, as a general rule, than that no restriction by way of prohibition or otherwise may be validly imposed under the authority of a state upon transportation between points in different states. So far, so good. But what is the basis of this rule? We submit that the doctrine seemingly established in the Supreme Court refers it to the wrong basis, that is to say, to the action (or rather inaction) of Congress, instead of to a right long antedating the existence of Congress, or indeed any of our constitutions, federal or state. Thus it has been said:

"The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted."[5]

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[3] 9 Wheat. (U. S.) 1, 211 (1824). See dissenting opinion in Bowman *v.* Chicago, etc. Ry. Co., 125 U. S. 465, 519 (1888).

[4] Clifford, J., in dissenting opinion in Gilman *v.* Philadelphia, 3 Wall. (U. S.) 713, 737 (1865).

[5] Bowman *v.* Chicago, etc. Ry. Co., 125 U. S. 465, 508 (1888).

"So long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled." [6]

We submit that the interjection of this needless doctrine has resulted in much confusion.

But if there were any doubt as to the sufficiency of protection given by the ancient rule above considered, the right of transportation between points in different states, seems now, like the right of transportation between points both in the state, or the right to manufacture or sell, amply guaranteed by the Fourteenth Amendment forbidding a state to deprive of "liberty or property," without due process of law.[7]

Nor has the point, though commonly ignored, been entirely overlooked by the Supreme Court. In Williams *v.* Fears,[8] where state legislation was objected to as "in conflict with the Fourteenth Amendment because it restricts the right of the citizen to move from one state to another," the court said:

"Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and *the right*, ordinarily, *of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment.*"

Here was applied the following language used in Allgeyer *v.* Louisiana,[9] where state legislation was held invalid as applied to transportation from state to state, the article in question being a letter mailed to another state:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways."

It seems reasonably clear that the right of transportation between points in different states is, as a rule, guaranteed against

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[6] Leisy *v.* Hardin, 135 U. S. 100, 109 (1890).

[7] This provision is said in Munn *v.* Illinois, 94 U. S. 113, 123 (1876), to be "old as a principle of civilized government," and to be "found in Magna Charta," as well as in all or nearly all the state constitutions.

[8] 179 U. S. 270 (1900).

[9] 165 U. S. 578 (1897).

interference by Congress, by the Fifth Amendment forbidding Congress to deprive of "liberty or property" without due process of law; that is to say, even if the ancient rule we have considered be insufficient. This provision is said to forbid

> "a regulation of interstate commerce, not merely affecting the mode or manner of transportation, but excluding from interstate transportation altogether certain classes of persons, or imposing conditions on such transportation as would wantonly and arbitrarily affect personal liberty." [10]

Why then the inconsistency in failing to recognize that the identical provision of the Fourteenth Amendment is equally a guaranty against interference by the states?

It will of course be borne in mind that it is only *as a general rule* that no restriction by way of prohibition or otherwise may be validly imposed under the authority of a state upon transportation between points in different states. The effect of the exercise by a state of its taxing powers calls here for only passing notice. As, notwithstanding *the general rule* that a state cannot interfere with manufacture or sale, or transportation between points both in the state, it may under certain conditions interfere therewith by way of prohibition or otherwise, so it is as to transportation between points in different states. Thus has been sustained the power of a state to prohibit the transportation of diseased cattle into the state,[11] and so as to quarantine regulations preventing the transportation of persons.[12] Similarly the power to prevent fraud or deception has been held to include power to prohibit, or, at any rate, to impose restrictions, upon such transportation;[13] and so as to the power to prohibit the sale and transportation of game, such game being a subject of common ownership.[14]

But the Supreme Court has established the rule that, under the power to regulate commerce, Congress may likewise interfere by way of prohibition or otherwise with transportation between points in different states. What are the precise limits of its power

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[10] United States *v.* Delaware & H. Co., 164 Fed. 215, 231 (1908).

[11] See Asbell *v.* Kansas, 209 U. S. 251 (1908).

[12] See Compagnie Française de Navigation, etc. *v.* Louisiana State Board of Health, 186 U. S. 380, 387 (1902).

[13] See Plumley *v.* Massachusetts, 155 U. S. 461 (1894).

[14] See Silz *v.* Hesterberg, 211 U. S. 31 (1908).

in this direction remains, it seems, to be clearly defined by the court, but it seems a reasonable conclusion that it is substantially concurrent with the powers of the states. We submit that this is conceding to Congress an awkward usurpation of powers reserved to the states. Illustrations are the recognition of the power of Congress to establish quarantine regulations;[15] to prohibit the transportation of such articles as lottery tickets[16] or transportation under conditions of monopoly.[17]

But all that has thus far been said has been without reference to transportation *under conditions of special privilege.* Now the distinction between the bald right of transportation between points in different states, and the right of such transportation *under conditions of special privilege*, we regard as of vital importance, although little or no consideration has been given to it by the Supreme Court. In passing, we may observe that there seems to be no distinction in this respect between transportation between points in different states and other transactions, as, for example, manufacture or sale, or transportation between points in the same state. It is unnecessary, as a rule, to obtain special governmental authority to engage in manufacture or sale, or transportation between points in the same state; but the case is different if it is desired so to engage under conditions of special privilege, either as a corporation, or with power to exercise the right of eminent domain. Here, as in case of transportation between points in different states, such special authority is necessary, not, indeed, for the exercise of the bald right to manufacture or sell or transport, but to manufacture or sell or transport under conditions of special privilege.

The most conspicuous instance of transportation under conditions of special privilege is that of transportation by railroad. It is indeed true that, for the purpose of engaging therein, there is not necessarily and in the nature of things required the grant of any special privilege. Abstractly the right to transport from state to state by railroad seems as clear as the right to transport afoot or by wagon. But such transportation is always, or nearly

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[15] See Morgan's Steamship Co. *v.* Louisiana Board of Health, 118 U. S. 455, 464 (1886).

[16] See Champion *v.* Ames, 188 U. S. 321, 356 (1903).

[17] See Northern Securities Co. *v.* United States, 193 U. S. 197, 335 (1904).

always, carried on by corporations requiring the exercise of the power of eminent domain. Hence, speaking generally, it is necessary to obtain governmental authority for the purpose of engaging in transportation by railroad between points in different states. But this is equally true under like conditions of the right to engage in manufacture or sale, or transportation between points in the same state.

What, now, is the source of authority to engage in interstate transportation *under conditions of special privilege?* It seems to us that this important point has received insufficient consideration from the Supreme Court. It does, indeed, seem established that such authority may be derived from Congress acting under the power to regulate commerce, as in cases of the creation of a corporation to engage in transportation by railroad.[18] The doctrine of the exclusiveness of the power of Congress under the Commerce clause seems to suggest the conclusion that such authority may not be derived from the states. Yet nothing would seem better settled than the contrary. It seems never to have been seriously questioned in the Supreme Court that it is within the powers of the states to create, for instance, a corporation to engage in interstate transportation by railroad;[19] and, indeed, the vast railroad systems of this country have, for the most part, been constructed solely under state authority.

In considering the extent of the power of interference, by way of prohibition or otherwise, with interstate transportation under conditions of special privilege, we obviously have four classes of cases to deal with: (1) interference by a state, where authority is derived from a state; (2) by Congress, where it is derived from a state; (3) by a state, where authority is derived from Congress; (4) by Congress, where it is derived from Congress.

(1) Where the authority to engage in interstate transportation, under conditions of special privilege, is derived solely from a state, it should be obvious, we submit, that, so far as the Commerce

[18] See California *v.* Central Pacific R. R. Co., 127 U. S. 1 (1888); Railroad Co. *v.* Maryland, 21 Wall. (U. S.) 456, 474 (1874). The non-existence of such power seems assumed by McLean, J., in State *v.* Wheeling & Belmont Bridge Co., 18 How. (U. S.) 421, 442 (1855).

[19] It seems to have been so assumed, rather than decided, in Railroad Co. *v.* Harris, 12 Wall. (U. S.) 65 (1870), where Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519, 588 (1839), was supposed to apply.

clause is concerned, it is within the power of the state to withdraw such authority wholly, or to prescribe the conditions under which it may be exercised. Yet the decisions of the Supreme Court do not support this view — the reason being, as it seems to us, failure to distinguish between the bald right to engage in interstate transportation, and the right so to engage under conditions of special privilege. Having reached the conclusion that in the former case it is, as a rule, beyond the power of a state to impose restrictions, the same rule was, without discrimination, applied to transportation under conditions of special privilege granted by the state itself. The seeming fallacy of this conclusion has not been altogether overlooked. It has been pertinently said:

"Certainly a state cannot be compelled to create corporations in aid of, or to facilitate, commerce between the states; but if it does create one capable of engaging in such commerce, and the corporation in fact so engages, is that an emancipation of the corporation from the control of the state?" [20]

What we regard, therefore, as a fallacy underlies the decision in Wabash, St. Louis, & Pacific Ry. Co. *v.* Illinois,[21] where, in the case of a *domestic* corporation, the regulation of rates for interstate transportation was held invalid. The same is true of Philadelphia & Southern Steamship Co. *v.* Pennsylvania,[22] a case of taxation of the gross receipts of a domestic corporation.

The same reasoning seems to us applicable to foreign corporations. Generally speaking, a state has unquestionable power to impose restrictions, even to the extent of prohibition, upon the transaction of business therein by a foreign corporation, and we submit that such reserved power should include the imposition of restrictions upon interstate transportation. But the settled rule is otherwise.

(2) We turn now to a consideration of the power of Congress to interfere with interstate transportation under conditions of special privilege, where the authority to engage therein is derived

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[20] State *v.* C. N. O. & T. P. Ry. Co., 47 Oh. St. 130 (1890). See also Railroad Co. *v.* Maryland, 21 Wall. (U. S.) 456, 471 (1874), and dissenting opinion in Wabash, St. Louis, & Pacific Ry. Co. *v.* Illinois, 118 U. S. 557, 586 (1886); also argument of counsel in State Freight Tax Case, 15 Wall. (U. S.) 232, 264 (1872).

[21] 118 U. S. 557 (1886).

[22] 122 U. S. 326 (1887).

from a state. We have already concluded that, as a rule, the right of interstate transportation is guaranteed against interference by Congress, either by the Fifth Amendment, or by the ancient rule we have considered. This statement applies, at any rate, to the bald right to engage in such transportation not under conditions of special privilege. But we have seen that it is established that the states have power to grant authority to engage therein under conditions of special privilege, for example, as a corporation. We submit that the right of transportation under these conditions is, by virtue of the Fifth Amendment or otherwise, as much beyond the power of interference by Congress as is the bald right of transportation not under conditions of privilege. In this view it is beyond the power of Congress, so far, at least, as the Commerce clause is concerned, either absolutely to prohibit such transportation, or to require the corporation to perform a condition, such as the payment of a license fee, before engaging therein. If such result be attainable at all, it must be by resort to some other provisions of the federal Constitution, as, for example, those conferring the power to tax.[23] Yet even this seems doubtful. But the contrary view that Congress has such power under the Commerce clause has been conspicuously advocated.[24] It remains for the Supreme Court to settle the point.

(3) It seems clear enough that, as a rule, it is beyond the power of a state to interfere with interstate transportation under conditions of special privilege, where the authority to engage therein is derived from Congress. Being, as we have seen, without such power even as to a corporation of its own creation, *a fortiori* is it without it as to a corporation created by Congress. Here, too, it is unnecessary to consider what power a state has over such a corporation, so far as concerns what is purely intrastate commerce or transportation.

(4) The question of the power of Congress to interfere with interstate transportation under conditions of special privilege, where the authority to engage therein is derived from Congress

[23] A suggestion of the existence of such power has sometimes been thought to be furnished by Veazie Bank *v.* Fenno, 8 Wall. (U. S.) 533 (1869), sustaining the imposition of a tax on the notes of state banks. See Hendrick, The Power to Regulate Corporations and Commerce, § 115.

[24] See in 3 Mich. L. Rev. 264 (1905) discussion by H. L. Wilgus of the recommendation by Mr. Garfield as Commissioner of Corporations.

itself, requires but little consideration. A corporation created by Congress, for the purpose of engaging therein, is doubtless, generally speaking, completely within the power of Congress, so far as concerns such transportation, though this power is subject to limitations imposed by the Fifth Amendment. Here, too, it is unnecessary to consider what power Congress has over such a corporation, so far as concerns what is purely intrastate commerce or transportation.

The statement of the rule that it is beyond the power of Congress or of the states, as the case may be, to interfere with interstate transportation under conditions of special privilege will, of course, be taken subject to the qualification already considered as applicable to transportation not under conditions of special privilege. For instance, the general rule that it is beyond the power of Congress so to interfere, where the authority is derived from a state, is subject to the qualification illustrated by the application of the Sherman Anti-Trust Act, enacted by way of giving effect to the rule of free competition, to transportation by railroad corporations created by the states.[25]

It remains to consider certain cases of transportation under conditions of special privilege, as to which there is some confusion in the decisions. Although such special privileges are ordinarily conferred on corporations, this is not necessarily the case, and, for the sake of clearness of thought, we shall assume that the cases about to be considered are those of privileges conferred, not upon corporations, but upon mere individuals.

Take first the case of a bridge constructed over a water that is a boundary between two states. So far as we are here concerned, there seems to be no distinction in kind between an interstate bridge and an interstate railroad. The difference is merely in degree; that is, the railroad is ordinarily longer than the bridge. And what has already been said as to railroads is largely applicable here. Transportation by bridge, like transportation by railroad, does not necessarily, and in the nature of things, require the grant of any special privilege, but it is commonly carried on under conditions that do require some such grant, as, perhaps, the power of eminent domain. It is established that authority to engage in

[25] See United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290 (1897); Northern Securities Co. *v.* United States, 193 U. S. 197, 335 (1904).

such transportation may be derived from Congress,[26] and it seems a reasonable conclusion that, as in the case of railroads, it may also be derived from the states.[27] And the rules applicable in determining the extent of the power of interference, whether by Congress or by the states, seem substantially the same as in case of transportation by railroad. Covington & Cincinnati Bridge Co. *v.* Kentucky [28] seems to go far toward justifying this view.

But the case of a ferry operated across a water that is a boundary between two states has given more difficulty. To apply what has already been said, transportation by ferry does not necessarily, and in the nature of things, require the grant of any special privilege, but it is commonly carried on under conditions that do require it. It seems a reasonable conclusion that authority to engage in such transportation may be derived from Congress, and it seems established that, as in case of railroads, it may be derived from the states.[29] It would seem to follow that the rules applicable in determining the extent of the power of interference, whether by Congress or by the states, are substantially the same as in case of transportation by railroad. And Gloucester Ferry Co. *v.* Pennsylvania [30] seems to go far toward justifying this view. But there is some confusion in the decisions on this point. Wiggins Ferry Co. *v.* East St. Louis,[31] sustaining the imposition by a municipality of a license for interstate transportation by ferry, seems rather hard to reconcile with the general doctrine of the Supreme Court on the subject. In St. Clair County *v.* Interstate Transfer Co.[32] a decision of the question whether "the respective states have the power to regulate ferries over navigable rivers constituting boundaries between states" was evaded by drawing a distinction between "a ferry in the restricted and legal signification of that term and transportation as such constituting interstate commerce." In the

[26] See Luxton *v.* North River Bridge Co., 153 U. S. 525 (1894), and argument of McLean, J., against the existence of such power, in State *v.* Wheeling & Belmont Bridge Co., 18 How. (U. S.) 421, 442 (1855); of Field, J., in Bridge Co. *v.* United States, 105 U. S. 470, 489, 495, 500 (1881).

[27] This seems to have been assumed in Gilman *v.* Philadelphia, 3 Wall. (U. S.) 713 (1865), where State *v.* Wheeling & Belmont Bridge Co., 13 How. (U. S.) 518 (1851), was explained as resting on the ground that Congress had acted upon the subject in regulating the navigation of the river.

[28] 154 U. S. 204 (1894).

[29] See Conway *v.* Taylor, 1 Black (U. S.) 603 (1861).

[30] 114 U. S. 196, 215 (1885).

[31] 107 U. S. 365 (1882).

[32] 192 U. S. 454 (1904).

absence of further declaration by the Supreme Court, there will doubtless continue to be some confusion on the subject, as is illustrated by New York Central, etc. R. Co. *v.* Freeholders of Hudson,[33] where was sustained the regulation under state authority of charges for ferriage across the Hudson River between New Jersey and New York. While we regard this decision as probably wrong, according to the authorities, that is, as inconsistent with Wabash, St. Louis, & Pacific Ry. Co. *v.* Illinois,[34] and other decisions of that character, we also regard it as sound in principle. This statement will be understood by a reference to what we have already said as to the power of interference by a state with interstate transportation under conditions of special privilege.

To summarize: — the fundamental right of transportation between points in different states is not derived from the Commerce clause, having been in existence long before the Commerce clause, and is one not merely against interference by individuals, but against interference under governmental authority, whether that of Congress or of the states.

But this statement applies only to the bald right of interstate transportation, as distinguished from such transportation *under conditions of special privilege.* For this purpose governmental authority is necessary. Such authority may be derived either from Congress or from the states.

There are four classes of cases of interference under governmental authority with interstate transportation under conditions of special privilege.

(1) *Interference by a state, where authority is derived from a state.* We submit that it is within the power of the state wholly to withdraw such authority, or to prescribe the conditions under which it may be exercised, but the decisions of the Supreme Court do not support this view.

(2) *Intefrerence by Congress, where authority is derived from a state.* We submit that, as a general rule, Congress has no such power, but it remains for the Supreme Court to settle the point.

(3) *Interference by a state, where authority is derived from Congress.* It seems clear that, as a general rule, a state has no such power.

(4) *Interference by Congress, where authority is derived from*

[33] 76 N. J. L. 664 (1909).

[34] 118 U. S. 557 (1886).

Congress. It seems clear that, as a general rule, Congress has such power.

The rules applicable generally to interstate transportation under conditions of special privilege seem applicable to such particular cases of transportation as those by bridge and by ferry, but there is some confusion in the decisions on this point.

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New York City.

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THE NEW YORK WORKMEN'S COMPENSATION ACT AS DUE PROCESS OF LAW. — In 1910 the Legislature of the State of New York passed a statute [1] modeled upon the English Workmen's Compensation Act of 1897. It provides that for all personal injuries to workmen in the course of eight specified employments, declared to be "especially dangerous," the employers shall be liable for damages, unless caused at least in part by the serious or willful misconduct of the injured workman.[2] Recently

[1] N. Y., LAWS OF 1910, ch. 674, §§ 215–219 g.

[2] The most important sections are:

"§ 217. Basis of Liability. — If, in the course of any of the employments above described, personal injury by accident arising out of and in the course of the employment after this article takes effect is caused to any workman employed therein, in whole or in part, or the damage or injury caused thereby is in whole or part contributed to by

"a. A necessary risk or danger of the employment or one inherent in the nature thereof; or

"b. Failure of the employer of such workmen or any of his or its officers, agents or employees to exercise due care, or to comply with any law affecting such employment; then such employer shall, subject as hereinafter mentioned, be liable to pay compensation at the rates set out in section two hundred and nineteen-a of this title; . . . provided that the employer shall not be liable in respect of any injury to the workman which is caused in whole or in part by the serious and willful misconduct of the workman.

"§ 218. Rights of Action not affected. — The right of action for damages caused by any such injury, at common law or under any statute in force on January one, nineteen hundred and ten, shall not be affected by this article, and every existing right of action for negligence or to recover damages for injuries resulting in death is continued, and nothing in this article shall be construed as limiting such right of action, but in case the injured workman, or in event of his death his executor or adminis-

the Court of Appeals, reversing the decisions of the Appellate Division [3] and Special Term of the Supreme Court [4] unanimously held the statute unconstitutional. *Ives* v. *South Buffalo Ry. Co.*, 201 N. Y. 271. All the members of the court agreed that the classification of employments is a proper one, and that it is competent for the Legislature to abolish the fellow-servant rule and the defense of contributory negligence.[5] The decision rests on the ground that the provision for liability in the absence of negligence is not justified under the police power, and amounts to a deprivation of property without due process of law. Although in general the New York court has perhaps shown a greater tendency to overthrow statutes than the United States Supreme Court,[6] it has never been suggested that due process has a different meaning in the State Constitution than in the Fourteenth Amendment.[7] It is submitted that the act may be supported either (I) independently of the police power or (II) as an exercise of it.

I. The phrase "due process of law" can be given no definition which will settle all cases, and little that is helpful in determining the principal case can be culled from the general discussions. The provision undoubtedly applies to acts of the legislature as well as the judicial and the administrative departments; [8] and it limits legislation as to sub-

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trator, shall avail himself of this article, . . . he shall be barred from recovery . . . at common law or under any other statute on account of the same injury after this article takes effect. In case after such injury the workman, or in the event of his death his executor or administrator, shall commence any action at common law or under any statute other than this article against the employer therefor he shall be barred from all benefit of this article in regard thereto.

"§ 219 a. Scale of Compensation. — The amount of compensation shall be in case death results from injury:

"a. If the workman leaves a widow or next of kin at the time of his death wholly dependent on his earnings, a sum equal to twelve hundred times the daily earnings of such workman. . .

"2. Where total or partial incapacity for work at any gainful employment results to the workman from the injury, a weekly payment commencing at the end of the second week after the injury and continuing during such incapacity, subject as herein provided, equal to fifty per centum of his average weekly earnings when at work . . . *In no event shall any compensation paid under this article exceed the damage suffered, nor shall any weekly payment payable under this article in any event exceed ten dollars a week or extend over more than eight years from the date of the accident.*

[3] Ives *v.* South Buffalo Ry. Co., 140 N. Y. App. Div. 921.

[4] 68 N. Y. Misc. 643.

[5] The court declined to decide whether the provision of a fixed rate of compensation violated the stipulation in the State Constitution for trial by jury. This question is not in the scope of this note. This provision does not violate the Due Process provision. See Commissioners of Champaign Co. *v.* Church, 62 Oh. St. 318; Carroll *v.* Missouri Pacific Ry. Co., 88 Mo. 239.

[6] *Cf.* Wright *v.* Hart, 182 N. Y. 330, with Lemieux *v.* Young, 211 U. S. 489 (statutes regulating sales of entire stocks in trade of merchants); Westervelt *v.* Gregg, 12 N. Y. 202, with Baker's Exrs. *v.* Kilgore, 145 U. S. 487 (statutes cutting off husband's rights in wife's property); Ives *v.* South Buffalo Ry. Co., *supra*, with Chicago, Rock Island, & Pacific Ry. Co. *v.* Zernecke, 183 U. S. 582 (statute making railroads insurers of passengers). But in Lochner *v.* New York, 198 U. S. 45, the Supreme Court reversed the holding of the New York Court of Appeals that a statute limiting bakers to a sixty-hour week was constitutional.

[7] Both in the principal case and in Wright *v.* Hart, 182 N. Y. 330, Werner, J., also treats the Due Process clauses in the State and Federal Constitutions alike.

[8] See Chicago, Burlington & Quincy R. Co. *v.* Chicago, 166 U. S. 226, 233; Taylor *v.* Porter, 4 Hill (N. Y.), 140, 145; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed. 503.

stantive rights [9] as well as to adjective law. It requires, probably, that the same general system of law which existed in the states before the Constitution shall continue, and that the "fundamental" or "vested" rights which that system has recognized shall not be infringed.[10] The difficulty comes in determining what are such rights. But no person has any property or vested right in any one rule of the common law unless it is a fundamental rule.[11] Fifty years ago a state judge pointed out that the phrase did not mean that legislation as to property must stop at the precise point at which it stood when the Constitution was adopted,[12] and only this year Holmes, J., said that the broad words must not be pressed to "a drily logical extreme." [13]

The common law did not deprive a person of property except for events caused by the operation of instrumentalities which he employed or with which he had some responsible connection. But, it is submitted, that there is no truly fundamental rule of the common law narrower than this. In a majority of cases, A is not liable for damage done to B unless A is "at fault," by which is meant that he caused the damage intentionally or negligently. But originally a man was liable for all damage which he brought about; the law of negligence is of comparatively recent development and it does not embrace all torts.[14] Torts may be divided into three classes: (1) Those for which the defendant can be held only if he committed the damaging act intentionally, *e. g.*, deceit and malicious prosecution. (2) Those for which the defendant can be held if negligent in committing the act. (3) Those for which the defendant can be held where the act was not intended by him and where he was not negligent, but which was due to an instrumentality (not necessarily human) which he employed. Examples of the last are the liability for damage done by blasting,[15] of the keeper of a ferocious animal,[16] of a master for a servant, and of a ship for the care of disabled seamen.[17] All of these have been recognized in New York. Consequently the Legislature in passing the Workmen's Compensation Act merely declared, in effect, that for physical damage done to these workmen the requisites for the recovery of damages should be those of class 3 above, instead of those of class 2. Legislation changing the requisites for recovery for a tort has often been upheld. The abolition of the fellow-servant rule has repeatedly been held constitutional.[18] Almost every state in the Union has a statute giving an action for death by wrongful act, and this has never been declared invalid.[19] Other stat-

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[9] See 58 Pa. L. Rev. 191.

[10] This is the common statement. See Hurtado *v.* California, 110 U. S. 516, 536; East Kingston *v.* Towle, 48 N. H. 57, 61.

[11] See Munn *v.* Illinois, 94 U. S. 113, 134 (Waite, C. J.).

[12] Ames, C. J., in State *v.* Keeran, 5 R. I. 497, 506. For a history of due process before the Civil War, see 24 HARV. L. REV. 366, 460.

[13] See Noble State Bank *v.* Haskell, 219 U. S. 104, 110.

[14] See historical articles by Prof. Wigmore in 7 HARV. L. REV. 315, 383, 441; 8 *id.* 200, 377; also HOLMES, COMMON LAW, 79–161.

[15] Sullivan *v.* Dunham, 161 N. Y. 290.

[16] Muller *v.* McKesson, 73 N. Y. 195.

[17] See Scarff *v.* Metcalf, 107 N. Y. 211, 216.

[18] Missouri Ry. Co. *v.* Mackey, 127 U. S. 205; Powell *v.* Sherwood, 162 Mo. 605.

[19] See Carroll *v.* Missouri Pacific Ry. Co., 88 Mo. 239; Louisville Safety-Vault &

utes which have been upheld are those making municipalities liable for all damage done by mobs within their borders;[20] making railroads liable for all fires communicated from their engines;[21] making a person driving animals over a highway liable for all damage done by them to the highway banks;[22] making the owner of a vehicle liable for all damage done by its collisions;[23] and making railroads liable for all physical injuries suffered by passengers on its trains, unless due to the criminal negligence of the passenger.[24] Consequently it would seem to be a fair conclusion that the law of negligence is not such a fundamental principle of our system of jurisprudence as to be rendered inviolate by the due process clause.

The basis of the decision of the New York Court of Appeals is found in the following statement: "When our Constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another." [25] The examples of absolute liability above are quite inconsistent with this. The court dismisses the analogy of liability of the master for acts of his servant by saying that it is not an example of liability without fault, and that "the whole theory is expressed in the maxim *qui facit per alium facit per se*." [26] But that maxim is not broad enough to cover all liability for acts of servants, much of which rests on the totally distinct doctrine of *respondeat superior*, which is based on the policy that a person for whose benefit an act is done should bear the burden of its unfortunate consequences.[27] The liability of a ship in admiralty for care of a disabled seaman the court distinguishes on the ground that he is "a co-adventurer with the master" and shares in marine risks "which do not affect workmen on land." [28] But why is it different in principle to force the loss of sea accidents on the employer than to force on him the loss of machinery accidents? The court does not mention absolute liability for ferocious animals or for such acts as blasting. Its efforts to reconcile the cases upholding statutes similar to the New York act are not wholly convincing,[29] and the cases on which the court relies do not seem wholly to control the point at issue.[30] Werner, J., argues

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Trust Co. *v.* Louisville & N. R. Co., 17 S. W. 567 (Ky.); TIFFANY, DEATH BY WRONGFUL ACT, § 31.

[20] Darlington *v.* Mayor of New York, 31 N. Y. 164; Commissioners of Champaign Co. *v.* Church, 62 Oh. St. 318.

[21] St. Louis & San Francisco Ry. *v.* Mathews, 165 U. S. 1.

[22] Jones *v.* Brim, 165 U. S. 180.

[23] Levick *v.* Norton, 51 Conn. 461. Hare seems to doubt this case. See 2 HARE, CONSTITUTIONAL LAW, 882, 883.

[24] Chicago, Rock Island, & Pacific Ry. Co. *v.* Zernecke, 183 U. S. 582, affirming 59 Neb. 689; Clark *v.* Russell, 97 Fed. 900 (C. C. A.).

[25] 201 N. Y. 293.

[26] 201 N. Y. 311.

[27] See STORY, AGENCY, 9 ed., 518, n., 520–523.

[28] 201 N. Y. 311.

[29] Some of them are not mentioned.

[30] The cases relied on are State *v.* Divine, 98 N. C. 778; Ohio & Mississippi Ry. Co. *v.* Lackey, 78 Ill. 55; and several cases upsetting statutes making railroads liable for all animals killed by them (cited, 201 N. Y. 298. A fuller collection of such cases is that in 8 CYC. 1100). All these seem to go so far as to impose liability for events with which defendants might have no responsible connection. Possibly the animal statutes are not distinguishable, but most of them arose in the newer states, involved very small amounts, and apparently were not strenuously contested by the plaintiffs. It is noteworthy that a passage in the second edition of Black on which the court relies

that if the present statute is valid so would be one establishing socialism. Without discussing the validity of such a radical act, it seems sufficient to point out that it is easily distinguishable from the present one in that the former would be taking property for no event with which its owner has responsible connection.

II. It has never been doubted that the police power of the states survived the Fourteenth Amendment and all other Due Process provisions. The only effect of a Due Process clause on the police power is that it forbids its being exercised to produce arbitrary discrimination.[31] A New York statute involved in *Bertholf* v. *O'Reilly*[32] provided that any landlord who knowingly leased his building for saloon purposes should be liable for loss resulting from intoxication caused by the sale of liquor by his lessee. The sale of liquor, however, was not prohibited. The Court of Appeals upheld this statute as a proper exercise of the police power. Certainly this statute goes as far in imposing liability where there is no fault or direct causal connection as the Workmen's Compensation Act, and if the latter can be brought within the police power it would seem to be constitutional.

But the limits of the police power have always been shadowy.[33] According to the narrowest definition, it comprises legislation regarding public health, safety and morals.[34] Werner, J., stated that the Workmen's Compensation Act "does nothing to conserve the health, safety or morals of the employees"[35] and held that it did not come under the police power. Although it is unquestionably within the province of the court to decide whether a statute does concern health, safety and morals,[36] this is a mere question of fact, and the finding of the New York court on this point seems not free from doubt. After a careful study of industrial accidents for a year in Allegheny County, Pennsylvania, called the "Pittsburgh Survey," the author of an elaborate report argues that the effect of imposing absolute liability on employers would force them to take further steps to prevent accident and that fewer injuries would occur.[37] The same argument was advanced in the House of Lords when the Workmen's Compensation Act of 1897 was passed,[38] and it seems to be borne out by the results in England.[39] It seems that the New York act would have this same effect.[40]

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does not appear in his third edition, the temper of which strongly indicates that the author would uphold the New York statute. See BLACK, CONSTITUTIONAL LAW, 2 ed., 351; 3 ed., Preface, and 408.

[31] See Barbier *v.* Connolly, 113 U. S. 27, 31, 32.

[32] 74 N. Y. 509.

[33] See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 829–831; GUTHRIE, FOURTEENTH AMENDMENT, 73, 74.

[34] See Colon *v.* Lisk, 153 N. Y. 188, 197; Health Dept. *v.* Rector, 145 N. Y. 32.

[35] 201 N. Y. 302.

[36] See Lawton *v.* Steele, 152 U. S. 133, 137; People *v.* Hawkins, 157 N. Y. 1, 7.

[37] EASTMAN, WORK ACCIDENTS AND THE LAW, 216–220. For estimates of the vast number of industrial accidents in the country as a whole, and various specific parts, see 7 Mich. L. Rev. 461; BULLETIN ON INDUSTRIAL ACCIDENTS, STATE OF MINN., No. 1, Oct., 1909, pp. 12, 15.

[38] See The Outlook, vol. 97, p. 955 (April 29, 1911).

[39] See ANNUAL REPORT FOR 1907, MASS. BUREAU OF STATISTICS OF LABOR, Part II, pp. 225–226, quoting report of English Commission; OLIVER, DANGEROUS TRADES, 9.

[40] The New York Court of Appeals has said that the imposition of absolute liability tends to prevent accidents. See Sullivan *v.* Dunham, 161 N. Y. 290, 300; Darlington

But even if the above line of argument is not sound, the statute may still be brought under the police power. That power is not limited merely to health, safety and morals. Distinctly outside of this classification are, for example, the regulation of businesses affected by a public use,[41] and statutes aimed at the development of natural resources.[42] A less conservative view has been often stated that the police power extends to all regulations in the interests of great social and economic needs.[43] That the New York act is in the interest of a great social and economic need seems certain. Such legislation has been advocated by economists,[44] it has been adopted in almost every other civilized country,[45] it is being contemplated in several states of the United States,[46] and the report of the very commission which recommended the New York Statute showed that "our own system of dealing with industrial accidents is economically, morally, and legally unsound." [47]

One cannot but conjecture that the underlying ground for the decision is the conviction of the court that paternalism is contrary to our system of jurisprudence. The New York Court of Appeals has openly assailed paternalism,[48] and traces of this antagonism have cropped out in its decisions from time to time.[49] A contrary notion seems to be entertained by the Supreme Court of the United States [50] and by several careful students of our jurisprudence; [51] and it seems hardly likely that New York's narrow view of due process will find support in other jurisdictions.

THE NATURE OF THE RESPECTIVE INTERESTS OF HUSBAND AND WIFE IN COMMUNITY PROPERTY. — The community system, by which property rights of husband and wife are regulated in no inconsiderable por-

v. Mayor of New York, 31 N. Y. 164, 187. See also Indianapolis Union R. Co. *v.* Houlihan, 157 Ind. 494, 501.

[41] Munn *v.* Illinois, 94 U. S. 113.

[42] Manigault *v.* Springs, 199 U. S. 473; Head *v.* Amoskeag Manufacturing Co., 113 U. S. 9.

[43] In Noble State Bank *v.* Haskell, 219 U. S. 104, 111, Holmes, J., said, "In a general way, the police power extends to all the great public needs." See also Lawton *v.* Steele, 152 U. S. 133, 136; quoted by WATSON, THE CONSTITUTION, 603, "Beyond this, however, the State may interfere whenever the public interests demand it." McGehee in his treatise on DUE PROCESS OF LAW, has under "Police Power" a sub-heading, "Regulation in the Interest of Economic Prosperity and General Welfare" (p. 357), and says (p. 301) that the police power embraces "all legislation looking to the well being of society in its economic and intellectual aspects."

And dangerous employments have been several times mentioned as especially subject to the police power. See Indianapolis Union R. Co. *v.* Houlihan, 157 Ind. 494, 501; Louisville Safety-Vault & Trust Co. *v.* Louisville & N. R. Co., 17 S. W. 567, 569 (Ky.)

[44] See, for example, GILMAN, METHODS OF INDUSTRIAL PEACE, 234; DOWNEY, HISTORY OF LABOR LEGISLATION IN IOWA, 182–185.

[45] A list compiled in 1909 names twenty-three countries which have some form of absolute protection. See BULLETIN ON INDUSTRIAL ACCIDENTS, STATE OF MINN., No. 1, Oct., 1909, p. 5.

[46] See *id.*, pp. 5, 12–13.

[47] Werner, J., in the principal case, 201 N. Y. 287.

[48] See People *v.* Gillson, 109 N. Y. 389, 405.

[49] See People *v.* Hawkins, 157 N. Y. 1; Matter of Jacobs, 98 N. Y. 98.

[50] See Engle *v.* O'Malley, 219 U. S. 128.

[51] See BLACK, CONSTITUTIONAL LAW, Preface to 3 ed.; MCGEHEE, DUE PROCESS OF LAW, 362; Article by Professor Pound, 24 HARV. L. REV. 591.

tion of the United States, is a system wholly foreign to the English common law.[1] It is based on the conception that marriage is a sort of partnership,[2] at least to this extent, that property acquired during the marriage ought, upon its dissolution, to be divided equally between the partners or their respective representatives. But in the definition of their mutual interests while the marriage still continues, the courts of different jurisdictions vary widely.[3] The truth seems to be that, by the law of Spain and Mexico whence the system was derived, there existed a fiction difficult for Anglo-Saxon lawyers to reconcile with the facts. In theory, the property belonged equally to both, and was to be managed by the husband for their common benefit.[4] But in fact, the present rights of the wife were of so shadowy a nature that we find them repeatedly referred to by judges and text-writers as "a mere fictitious interest," [5] "*que se mantiene sôlo como una expectativa*," [6] "*une simple esperance*," [7] "a mere expectancy like that which an heir possesses in the estate of his ancestor." [8] The husband had every substantial incident of ownership and could treat the property as his own. "The community was a partnership that began only at its end."

The United States Supreme Court, overruling the Supreme Court of New Mexico, has recently held that a statute, applying to community property already acquired, might constitutionally deprive the husband of the right to dispose of it without the wife's consent. *Arnett* v. *Reade*, 31 Sup. Ct. Rep. 425.[9] The court, without deciding the exact nature of the wife's interest, seemed to rest the case upon the fact that her interest is at any rate sufficient to be entitled to protection against fraud; *i. e.*, that this was a sort of curative act, not taking from the husband any vested rights, but affording to the wife a more ample protection for rights already theoretically existent.

Against this decision it might well be argued that legal rights not legally enforcible are only solemn make-believe; and that the assumed [10] right of the wife to protection against fraud has no conclusive signifi-

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[1] The system formerly existed, by inheritance from early Spanish settlers, in Florida, the entire Louisiana Purchase territory, and the Mexican cessions. It still prevails, with statutory modifications, in Louisiana, Texas, California, Arizona, New Mexico, Nevada, Idaho, Porto Rico, and the Philippine Islands. It was deliberately adopted by statute in Washington.

[2] The term partnership is more figurative than accurate. See BALLINGER, COMMUNITY PROPERTY, §§ 15–16–17.

[3] Most states adopt the expectancy theory; but in Washington each spouse has a legal interest, misleadingly analogous to a co-tenancy. Holyoke *v.* Jackson, 3 Wash. Ter. 235; Stockland *v.* Bartlett, 4 Wash. 731. In Texas the husband has the whole legal estate subject to an equitable obligation in favor of the wife. Edwards *v.* Brown, 68 Tex. 329. This results from the express words of the Texas code. SAYLES', TEX. CIV. STATUTES, § 2968.

[4] See 5 SANCHEZ ROMAN, ESTUDIOS DE DERECHOS CIVIL, 815.

[5] See FEBRERO MEJICANO, Vol. I, §§ 19–20; Panaud *v.* Jones, 1 Cal. 488; Barnett *v.* Barnett, 50 Pac. 337, 339 (N. M.).

[6] 22 SCAEVOLA, ESPAÑA CODIGO CIVIL, 75, 76.

[7] POTHIER, TRAITÉ DE LA COMMUNAUTÉ, § 497; FRASER, DOMESTIC RELATIONS UNDER THE LAW OF SCOTLAND, 338, 339.

[8] Barnett *v.* Barnett, *supra*. See also Guice *v.* Lawrence, 2 La. Ann. 226.

[9] Spreckels *v.* Spreckels, 116 Cal. 339, reaches the contrary conclusion and is followed by McKenna, J., in his dissent from the main case.

[10] No one seems to know what would constitute fraud. See Garrozi *v.* Dastas, 204 U. S. 64, 78.

cance. Similar protection is afforded to dower,[11] curtesy,[12] and alimony,[13] yet these are mere expectancies,[14] and no one would suggest that their inchoate existence would render constitutional a statute depriving either spouse of the right to dispose freely of his separate property.[15] Secondly, is it true that you may ignore the husband in the protection of the wife? Is he not like a life tenant with power of alienation? It is no mere expectancy that he is deprived of, but the right to sell, waste, give away, or riotously to enjoy.[16] If a husband seized *jure uxoris* cannot be deprived of the right to enjoy the rents and profits,[17] the owner of an easement be deprived of his right of beneficial user,[18] a co-tenant of the right to extract ore,[19] or a husband of the right to convey the homestead,[20] how can this free agent be converted into a Siamese Twin?

The ground of the decision must be, as previously suggested, that the whole institution is so anomalous that common-law analogies are not in point, that the husband, though not a real trustee, is a sort of quasi-trustee, a Spanish distant equivalent of a trustee, for the juristic entity, the community; and that as such he may properly be subjected to a little wing clipping.

NATURE OF RELATION BETWEEN DONEE OF GENERAL POWER OF APPOINTMENT AND PROPERTY SUBJECT THERETO. — A leases property to B for life, and then as C by deed or will shall appoint. What is C's relation to the property? From a study of the cases it is obvious that there exist two wholly distinct and antagonistic conceptions,[1] and that despite their inconsistency either may be applied to the same power by the same court according to the circumstances under which the question is presented.

The first is the strictly technical theory, that C has no interest in the property itself;[2] he is a mere automaton whose function it is to designate another's beneficiary. He is not a conduit of title. He never has title. The appointee takes by relation, not from the instrument executing, but from the instrument creating the power. Accordingly, we find that persons who could not make valid conveyances may exe-

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[11] Swaine *v.* Perine, 5 Johns. Ch. (N. Y.) 482; even though the prospective wife did not know the husband had any property. Chandler *v.* Hollingsworth (N. J.). Cited in 2 BISHOP, LAW OF MARRIED WOMEN, § 343, n.

[12] Freeman *v.* Hartman, 45 Ill. 57.

[13] Murray *v.* Murray, 115 Cal. 266.

[14] Randall *v.* Krieger, 23 Wall. (U. S.) 137. See note on McNeer *v.* McNeer, 19 L. R. A. 256.

[15] Gladney *v.* Snyder, 172 Mo. 318.

[16] Garrozi *v.* Dastas, *supra*; Spreckels *v.* Spreckels, *supra*; Lord *v.* Hough, 43 Cal. 581.

[17] Cases collected in 19 L. R. A. 257, 258.

[18] Eaton *v.* Boston, Concord, & Montreal R. Co., 51 N. H. 504.

[19] See Butte & Boston Consol. Mining Co. *v.* Montana Ore Purchasing Co., 25 Mont. 41.

[20] Gladney *v.* Snyder, *supra*.

[1] Attorney-General *v.* Upton, L. R. 1 Exch. 224, 230, 231.

[2] Middleton *v.* Crofts, 2 Atk. 661; Commonwealth *v.* Williams' Executors, 13 Pa. St. 29; Gilman *v.* Bell, 99 Ill. 144, 150.

cute powers; to wit, infants[3] and married women.[4] So, too, the instrument by which the power is exercised need not be such as would pass title to the property if it actually belonged to the appointor.[5] The donee's creditors cannot seize upon the property,[6] nor compel him to exercise the power in their favor,[7] nor does it pass to his assignee in bankruptcy.[8] His wife gets no dower in the property,[9] and when the appointment is by will the appointees take, not through the donee's executors, but those of the donor.[10] To be sure the donee may by apt words compel the property to pass through his executors, but even then they take not *quâ* executors but as trustees for the appointee.[11]

The second conception is the popular, or layman's theory. This disregards technicalities and looks only to the substance of the situation. The donee may unconditionally dispose of the property to anybody including himself. Why not treat him in law as what he is in substance? Accordingly, for purposes of taxation, the appointee is regarded as inheriting from the one who executes the power,[12] and the latter's creditors may recover the appointed property as though he had fraudulently conveyed away his assets.[13] So, too, in applying the rule

[3] *In re* D'Angibari, 15 Ch. D. 228; Sheldon *v.* Newton, 3 Oh. St. 494, 507. This follows ordinary agency principles. It is changed by statute in some jurisdictions. N. Y. CONSOL. LAWS, 1909, 5013, § 141; WIS. STATUTES, 1898, § 2138; MONT. CODE, 1907, § 4555.

[4] Osgood *v.* Bliss, 141 Mass. 474; Young *v.* Sheldon, 139 Ala. 444.

[5] Murphy *v.* Deichler, [1909] A. C. 446; Goods of Huber, [1896] P. 209. In these cases the donees of English powers were domiciled abroad, and were able to execute the powers by "wills," which, though conforming to English requisites, would have been refused probate at their domiciles. Similarly, the law of the donor's domicile decides whether, given a formally valid document, the words shall be construed to exercise the power. Sewall *v.* Wilmer, 132 Mass. 131; Bingham's Appeal, 64 Pa. St. 345; Cotting *v.* De Sartiges, 17 R. I. 668. *Contra*, *In re* D'Este's Settlement Trusts, [1903] 1 Ch. 898. See 19 HARV. L. REV. 122, 123.

[6] Cleveland Nat. Bank *v.* Morrow, 99 Tenn. 527; Holmes *v.* Coghill, 12 Ves. Jr. 206. But see statutes cited in note 13, *infra*.

[7] Gilman *v.* Bell, *supra*.

[8] Jones *v.* Clifton, 101 U. S. 225.

[9] This was long disputed, especially in the case of powers appendant — see Co. Litt. 216 *a*–248 *a* — but seems settled at last. Ray *v.* Pung, 5 B. & Ald. 561; Moreton *v.* Lees, cited in SUGDEN, POWERS, 8 ed., 144 n. See Maundrell *v.* Maundrell, 7 Ves. Jr. 566; 10 Ves. Jr. 246.

[10] *In re* Thurston, 32 Ch. D. 508; *In re* Davies' Trusts, L. R. 13 Eq. 163. *Cf.* Chamberlain *v.* Hutchinson, 22 Beav. 444.

[11] *In re* Treasure, [1900] 2 Ch. 648, 652; *In re* Dodson, [1907] 1 Ch. 284. *Contra*, *In re* Fearnsides, [1903] 1 Ch. 250. See 16 HARV. L. REV. 376.

[12] Attorney-General *v.* Upton, L. R. 1 Exch. 224; Minot *v.* Stevens, 93 N. E. 973 (Mass.); *In re* Kissell's Estate, 121 N. Y. Supp. 1088; Chanler *v.* Kelsey, 205 U. S. 466. But the degrees of relationship are reckoned from the donor of the power. Commonwealth *v.* Williams' Executors, *supra*; *In re* Barker, 7 H. & N. 109.

[13] Fleming *v.* Buchanan, 3 De G., M. & G. 976; Clapp *v.* Ingraham, 126 Mass. 200. The analogy of a fraudulent conveyance is not strictly accurate. (1) The donee's own property must be exhausted before any of the appointed property can be reached. Bainton *v.* Ward, 2 Atk. 172. See Fleming *v.* Buchanan, *supra*; White *v.* Mass. Inst. of Technology, 171 Mass. 84, 96. (2) The appointee will lose his preference even though he is a *bonâ fide* purchaser. Beyfus *v.* Lawley, [1903] A. C. 411. *Contra*, Patterson *v.* Lawrence, 83 Ga. 703. The doctrine that appointed property is assets was disapproved of in Commonwealth *v.* Duffield, 12 Pa. St. 277; and denied in Humphrey *v.* Campbell, 59 S. C. 39. See Wales *v.* Bowdish, 61 Vt. 23; Patterson *v.* Lawrence, *supra*. Statutes in several jurisdictions subject the property to seizure by creditors of the donee even before appointment. ALA. CIVIL CODE, 1907, § 3423; N. Y. CONSOL. LAWS, 1909, 5015, § 149; WIS. ST., 1898, § 2108.

against perpetuities, a general power is treated as practically identical with ownership.[14] By dealings inconsistent with the existence of the power a donee is estopped to derogate from his own grant,[15] though a guilty trustee is not.[16] And finally, a universal legacy of "all my property" will pass the property subject to the power.[17]

The conflict between the two theories was neatly illustrated recently. The donee of an English power was domiciled in Holland. By the laws of Holland no person may dispose by will of over seven-eighths of his property, the devolution of the residue being prescribed by law. By a will executed in accordance with all the formal requisites of both countries, she left to her husband "all the property which the law would allow her to dispose of." It was held that the husband took the entire property, not merely seven-eighths. *Re Pryce*, 130 L. T. 415 (Eng., Ch. D., Feb. 20, 1911). Clearly the real question was as to the nature of her relation to the property. It is submitted that the court rightly regarded it as one of agency. The technical doctrine should be disregarded only for strong equitable reasons. On principle there can be no difference between barring dower and barring statutory devolution; nor between allowing the appointee to take under a will which by the law of the donee's domicile could have passed none of his property, and allowing him to take under a will which by the same law could have passed only seven-eighths.[18]

OBEDIENCE TO ORDERS AS JUSTIFICATION FOR SOLDIER. — Under the federal Constitution, there are three kinds of military jurisdiction: military law, military government, and martial law.[1] "Martial law proper is called into action . . . in times of insurrection or invasion within districts or localities where ordinary law no longer adequately secures public safety and private rights."[2] In some states in times of insurrection, governors have declared a state of "qualified" martial law.[3] And the right so to do has been recognized by the United States Supreme Court.[4] Under martial law, the military overrides the civil power, so

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[14] A general power is not void although it may be exercised at a remote period. Bray *v.* Bree, 2 Cl. & F. 453. The remoteness of an appointment under a general power is reckoned, not from the date of the creation of the power, but from the date of its execution, Mifflin's Appeal, 121 Pa. St. 205; unless the power is exercisable by will only, Genet *v.* Hunt, 113 N. Y. 158; *In re* Powell's Trusts, 39 L. J. Ch. 188. *Contra*, Rous *v.* Jackson, L. R. 29 Ch. D. 521; *In re* Flower, 34 Wk. Rep. 149.

[15] Horner *v.* Swann, 1 Turn. & R. 430. See West *v.* Berney, 1 Russ. & M. 431.

[16] Wetmore *v.* Porter, 92 N. Y. 76.

[17] Wills Act, 1 VICT. c. 26, § 27; Sewall *v.* Wilmer, *supra*. *Contra*, Cotting *v.* De Sartiges, *supra*.

[18] Query: could a statute at the donee's domicile affect his relation to foreign property under a foreign power?

[1] This is the classification of Chase, C. J., in *Ex parte* Milligan, 4 Wall. (U. S.) 2, 141.

[2] See *Ex parte* Milligan, *supra*, 142.

[3] Commonwealth *ex rel.* Wadsworth *v.* Shortall, 206 Pa. St. 165; *Re* Moyer, 35 Colo. 159.

[4] See Luther *v.* Borden, 7 How. (U. S.) 1, 45. This case arose in connection with the Dorr Rebellion in Rhode Island. A late federal case upholds the governor's proc-

that the soldier has a very broad justification for acts done in pursuance of his duty.

But ordinarily the military power of the states is at all times subordinated to the civil power.[5] During a riot the militia is called out to aid the civil authorities, and not to supersede them.[6] In other words the militia, subject to the civil power, acts merely as a body of armed police. The soldier, therefore, while undertaking extra obligations under the military law, is still subject to all his usual liabilities as a citizen.[7] If he commits a crime, or incurs a debt, his military character will not protect him in a civil court. To what extent, then, if at all, is the soldier protected when acting in obedience to the orders of his officers? Obedience to orders should not of itself constitute a complete justification. But a soldier must obey any legal order of his superior. And though he is not bound to carry out any illegal order, yet the discipline of the army or the militia requires that the private shall not question his orders, but obey promptly. So it has been held, that the soldier is protected by orders which are not obviously illegal and unjustifiable.[8]

A recent Kentucky case attempts to define more precisely the limits within which soldiers may lawfully act. *Franks* v. *Smith*, 134 S. W. 484 (Ky.). The defendant, a militiaman on riot duty, under orders to arrest all passers-by carrying concealed weapons, arrested the plaintiff who had a pistol in his buggy. The court assumes that the defendant acted in strict obedience to orders, and holds "as a matter of law that the orders, which a soldier is justifiable in executing, are confined to such as a peace-officer in the discharge of his duty might execute." [9] Since a peace-officer would not have been justified in making this arrest, the plaintiff recovers in an action for false imprisonment. As the function of the militia when called out on riot duty in aid of the civil authorities, is to act as armed police,[10] the case quite correctly defines a justifiable order as one which a peace-officer might execute. And, of course, in obeying such an order the private is protected.[11] If, however, the order be illegal,[12] should not the soldier have a rather broader protection than the principal case suggests? It is necessary to the efficiency of the militia, that apparently reasonable orders be obeyed. If an illegal order appears reasonable, why does the private obey it at his peril? The principal case suggests that if a soldier is not liable when obedient to an illegal though seemingly reasonable order, "any private citizen may at any time and under any circumstances be deprived of his liberty and left without redress." [13] But

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lamation of martial law in the Colorado case in note 3, *supra*. Moyer *v.* Peabody, 148 Fed. 870.

[5] This is a common provision in the bill of rights of the state constitutions, of which § 22, Ky. Bill of Rights is typical. See Ky. St., § 2673 (Russell's St., § 4696).

[6] Ela *v.* Smith, 5 Gray (Mass.) 121; State *v.* Coit, 8 Oh. Dec. 62.

[7] See State *v.* Sparks, 27 Tex. 627, 632.

[8] United States *v.* Clark, 31 Fed. 710. See Riggs *v.* State, 3 Coldw. (Tenn.) 85.

[9] Franks *v.* Smith, 134 S. W. 484, 492 (Ky.).

[10] See cases in note 6, *supra*.

[11] Teagarden *v.* Graham, 31 Ind. 422.

[12] Louisiana has a statute typical of those which exist in several states, providing that members of the militia shall not be liable civilly or criminally for acts done while in active service. This gives protection even under an illegal order. La. Act, No. 181, p. 371 of 1904, § 21.

[13] See Franks *v.* Smith, 134 S. W. 484, 490 (Ky.).

it is submitted that this argument overlooks both that to afford a justification the command must seem proper, and that, whatever may be the defense of the private, the injured citizen still has his remedy against the officer who issued the illegal order.[14]

DE FACTO OFFICERS. — The *de facto* doctrine is based on the paramount necessity of protecting the public.[1] With regard to the public the acts of a *de facto* officer are as valid as those of a *de jure* officer. To force outsiders to deal with the former at their peril or to try his title to office on every occasion would be grossly unfair and thoroughly impracticable. Such considerations have led the courts to extend the older and more technical definition [2] of a *de facto* officer to include any one who without legal authority is performing the duties of an office, and "has the reputation of being the officer he assumes to be." [3] The public is also more fully protected if such an officer is held to strict accountability. His defective title, therefore, does not release him from liability for such acts as would be torts or crimes, if done by the *de jure* officer.[4]

Although he might thus incur many burdens, the common law gave him no corresponding benefits. For he could not deny that he was not in fact an "officer." In this matter the common law was rigid but perfectly consistent. A public office was a delegation of certain sovereign powers [5] and was treated in a way analogous to a grant of land.[6] The holder was said to be "seised of his office." If he was removed, his office still continued.[7] If a salary was annexed, it was an office "coupled with an interest." [8] Under such a view, the *de facto* holder was no better than a disseisor, and it followed logically that he was not entitled to any salary,[9] or if it had, in fact, been paid, it could be recovered from him by the *de jure* officer.[10] Such is the prevailing law at the present time.

But there has been a certain tendency to treat offices, and particularly the minor ones, as analogous to contracts of employment.[11] Certain courts have felt that as an officer is a servant of the people, his salary ought to depend upon the services he has rendered them.[12] Such considerations have caused them to relax the older common-law rule and permit the *de facto* officer to recover the salary of the office where there

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[14] The subject of this note under the English law is discussed in DICEY, THE LAW OF THE CONSTITUTION, 7 ed., Ch. VIII and IX.

[1] The leading American case on this subject is State *v.* Carroll, 38 Conn. 449. For a full treatment of this whole subject, see CONSTANTINEAU, THE DE FACTO DOCTRINE.

[2] The older view required "color of an election." Carleton *v.* People, 10 Mich. 250.

[3] Lord Ellenborough in King *v.* Village of Bedford Level, 6 East 356.

[4] Diggs *v.* State, 49 Ala. 311.

[5] United States *v.* Germaine, 99 U. S. 508.

[6] 2 Bl. Comm. 36.

[7] Thus, if an officer was removed for cause he was ineligible for reëlection until the complete term of his old office had expired. State *v.* Rose, 74 Kan. 262.

[8] State *v.* Stanley, 66 N. C. 59.

[9] Dolan *v.* New York, 68 N. Y. 274.

[10] Coughlin *v.* McElroy, 74 Conn. 397. See 15 HARV. L. REV. 675.

[11] Erwin *v.* Jersey City, 60 N. J. L. 141.

[12] Stuhr *v.* Curran, 44 N. J. L. 181.

was no *de jure* claimant.[13] *Peterson* v. *Benson*, 112 Pac. 801 (Utah). Some have gone further and have allowed him to set off such expenses as he had incurred against the claim of the *de jure* officer.[14] Beyond this, few courts have ventured.

These cases give relief upon essentially equitable grounds. If the doctrine of unjust enrichment is thus invoked, ought it not to be consistently applied? Ought not the recovery in the first class of cases and the extent of the set-off in the second to be limited to the amount that the state has been enriched or the *de jure* officer benefited? Then the true conception of an "office" will be left intact. The salary would still be a part of the office and both would belong to the *de jure* officer.[15] For he only is an "officer" to whom the sovereign power has delegated sovereign functions.

CONSTITUTIONALITY OF COMMON PROVISIONS IN PRIMARY ELECTION ACTS. — Primary election laws owe their creation to the corruption, abuse, and complex methods of the political caucus or convention of the past century.[1] They aim to simplify the difficulties of nomination for public office and enable the individual voter to exert the influence he deserves.[2] Legislative interference with political parties is justified on the basis of securing a free expression of the will of individual citizens by such reasonable regulation,[3] or on the ground that the plenary power of the legislature thus comes into play, since political parties are not mentioned in the Constitution,[4] or that the legislature having granted the privilege of the Australian ballot may condition its use.[5] These laws frequently stipulate that a party wishing to use the primary system must have polled a certain percentage of the general vote,[6] or in its primary must have polled a certain percentage of its own vote for a particular office at the last election.[7] Thus a recent Wisconsin case, *State ex rel. McGrael* v. *Phelps*, 128 N. W. 1041, holds a statute requiring that the aggregate number of votes cast for all candidates at the primary must equal twenty per cent of the party vote for governor at the preceding election constitutional, while a North Dakota case, *State ex rel. Dorval* v. *Hamilton*, 129 N. W. 916, reaches an opposite result where

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[13] Behan *v.* Davis, 3 Ariz. 399. The *de facto* officer may, however, sue for his salary in several states even when there is a *de jure* officer. Brinkerhoff *v.* Jersey City, 64 N. J. L. 225; Gorman *v.* Boise County Commissioners, 1 Idaho 655; Henderson *v.* Glynn, 2 Colo. App. 303; Reynolds *v.* McWilliams, 49 Ala. 552.

[14] Bier *v.* Gorrell, 30 W. Va. 95; Henderson *v.* Koenig, 192 Mo. 690; Mayfield *v.* Moore, 53 Ill. 428. See 23 HARV. L. REV. 571.

[15] Nichols *v.* MacLean, 101 N. Y. 526. The *de jure* officer can recover the salary even if he has been working elsewhere. Bullis *v.* The City of Chicago, 235 Ill. 472. But see Farrell *v.* City of Bridgeport, 45 Conn. 191.

[1] See 2 BRYCE, THE AMERICAN COMMONWEALTH, 3 ed., 98, 101–102.

[2] See MEYER, NOMINATING SYSTEMS, part II, ch. I. For an excellent article on recent primary legislation, see 5 ILL. L. REV. 203.

[3] Ladd *v.* Holmes, 40 Or. 167.

[4] See Kenneweg *v.* County Comm. of Allegany County, 102 Md. 119.

[5] Commonwealth *v.* Rogers, 181 Mass. 184.

[6] MINN. REVISED LAWS, 1905, ch. VI, § 182.

[7] WIS. LAWS OF 1909, ch. 477. See CAL. LAWS OF 1909, ch. 405.

the percentage was thirty per cent of the last party vote for secretary of state.

Election laws confining the advantages of the Australian ballot and methods of nomination by convention to parties polling a certain percentage of the vote have been generally upheld,[8] the object of such restrictions being to keep the officially printed ballot within convenient bounds, and to prevent confusion in voting. The similar provision of the primary laws, however, is designed to check the members of one party from taking part in the nominations of another, to prevent the accidental nomination of a non-representative candidate, to determine what shall constitute the act of a party, and to stimulate the elective franchise at the primaries. Such provisions have been attacked on various grounds as contravening the state constitutions,[9] but have been upheld by several courts.[10] It is contended that this interference is an unjust and unreasonable discrimination against the smaller parties, that the legislature has no power of regulation over political organizations, and that voters are thus deprived of the right of selection of candidates which is an incident to the right of suffrage.[11] True, several parties might conspire by combination to deprive another of its access to the primaries by agreeing to vote for its candidate for the office fixed as a criterion, but it is submitted that the prevention of this is within the domain of the legislature rather than the judiciary. In the absence of constitutional provision such as allowing citizens to convene,[12] it is difficult to detect why a legislative body has not the power to declare that organizations having a certain number of votes shall enjoy certain privileges just as much as that an individual receiving the greatest number of votes shall occupy a public office. Nor is it for the court to pass upon the reasonableness or stability of acts of the legislature. Since parties unable to fulfil the requisites of the primary laws are not usually deprived of their existence thereby, but still have the alternative of nomination by petition,[13] it would seem that the North Dakota court might better have considered the statute of that state in the light of its discriminating provision, that unless the required percentage be obtained "*no nomination* shall be made in that party for such office."[14] For if this clause is literally construed it might well be held to impair the right of suffrage as provided for by the state constitution.

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[8] De Walt *v.* Bartley, 146 Pa. St. 529; People *ex rel.* Dickerson *v.* Williamson, 185 Ill. 106. See 21 HARV. L. REV. 622.

[9] The North Dakota Constitution offers a typical example of the grounds of attack: § 11, "All laws of a general nature shall have a uniform operation;" § 20, "No citizen or class of citizens shall be granted privileges or immunities which upon the same terms shall not be granted to all citizens."

[10] State *ex rel.* Fitz *v.* Jensen, 86 Minn. 19; State *ex rel.* Adair *v.* Drexel, 74 Neb. 776; Katz *v.* Fitzgerald, 152 Cal. 433; Ladd *v.* Holmes, *supra.*

[11] See MERRIAM, PRIMARY ELECTIONS, ch. VI.

[12] See Britton *v.* Board of Election Comm., 129 Cal. 337.

[13] State *ex rel.* Fitz *v.* Jensen, *supra*; State *ex rel.* Adair *v.* Drexel, *supra*; Ladd *v.* Holmes, *supra.*

[14] "If the total vote cast for any party candidate or candidates for any office for which nominations are herein provided for shall equal less than thirty per cent of the total number of votes cast for Secretary of State of the political party he or they represented at the last general election, *no nomination* shall be made in that party for such office. . . ." NORTH DAKOTA LAWS OF 1907, ch. 109, § 12.

SEIZURE OF INCRIMINATING EVIDENCE AT TIME OF PRISONER'S ARREST. — In a recent federal case, the prosecution was ordered to return to the prisoner before trial certain incriminating books and papers that had been seized without a warrant at the time of the prisoner's arrest on the ground that the seizure was unreasonable under the Fourth Amendment[1] to the federal Constitution. *United States* v. *Mills*, 185 Fed. 318 (Circ. Ct. S. D. N. Y.).[2] This decision was frankly based on a *dictum* of the United States Supreme Court,[3] in which it was broadly laid down that any search and seizure is unreasonable that obtains evidence incriminating the person whose premises are searched. The reasoning by which this conclusion was reached was, that since a search and seizure by which incriminating evidence is obtained is contrary to the Fifth Amendment,[4] such a seizure is conclusively unreasonable. But it must be denied that a person is "compelled to be a witness against himself" when incriminating evidence is simply seized from him, and no testimonial word or act on his own part is required.[5] The two Amendments have different origins,[6] and should not be confused.

The conception that it is unreasonable to seize from a person and offer in evidence against him things that he could not be compelled to produce under a subpœna *duces tecum*[7] is often a useful test of unreasonableness.[8] How far this rule can be followed, however, is doubtful.[9] It seems hardly the conclusive test that the language of the Supreme Court assumes it to be. For since the Fifth Amendment is not violated by a search or seizure to obtain incriminating evidence, and since the Fourth Amendment prohibits only unreasonable searches and seizures, it would seem that there may be instances where a search and seizure is reasonable and proper, and hence constitutional even though incriminating evidence is thereby obtained.

It must be remembered that the Fourth Amendment is properly nothing more than a constitutional pronouncement of a common law rule,[10]

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[1] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2] *Contra*, United States *v.* Wilson, 163 Fed. 338.

[3] Boyd *v.* United States, 116 U. S. 616. The decision simply was that papers produced by the defendant under a statutory order of court were improperly admitted in evidence over the defendant's objection, since it infringed the privilege against self-incrimination.

[4] The Fifth Amendment provides, *inter alia:* "Nor shall [any person] be compelled in any criminal case to be a witness against himself."

[5] Adams *v.* New York, 192 U. S. 585. See 3 WIGMORE, EVIDENCE, §§ 2263, 2264. The result of this questionable reasoning in the Boyd case has been the following decisions: United States *v.* Wong Quong Wong, 94 Fed. 832; State *v.* Slamon, 73 Vt. 212; State *v.* Sheridan, 121 Ia. 164.

[6] See 3 WIGMORE, EVIDENCE, § 2250 *et seq.* For the historical causes of the Fourth Amendment, see COOLEY, CONST. LIM., 7 ed., 424 *et seq.*

[7] "But in a criminal or penal cause, the defendant is never forced to produce any evidence, though he should hold it in his hands in court." Lord Mansfield in Roe *v.* Harvey, 4 Burr. 2484, 2489.

[8] See Entick *v.* Carrington, 19 Howell's State Trials, 1030, 1073.

[9] See COOLEY, CONST. LIM., 7 ed., 432.

[10] See STORY, CONSTITUTIONAL LAW, 4 ed., § 1902.

well recognized in England before the adoption of the Amendment,[11] and incorporated in the constitutions of the various states.[12] So, the judicial determination in those jurisdictions of what is reasonable is professedly a declaration of the same law that is embodied in the federal Amendment. Certain exceptions to the broad language of the Supreme Court are well recognized. In the collection of taxes,[13] the regulation of certain businesses,[14] the recovery of stolen goods,[15] and the confiscation of illegal property[16] a search and seizure has been held reasonable though productive of incriminating evidence.[17]

And the principal case affords another example of a search and seizure for the purpose of punishing crime which has never been considered as transgressing the bounds of reasonableness.[18] For it has been recognized that when a person charged with a crime is arrested by a proper warrant,[19] it is reasonable to seize without a warrant property and papers found in his possession at the time of the arrest, for the very purpose of using them as evidence against him.[20] This does not seem to be a confiscatory right, but rather one "derived from the interest which the state has in a person guilty of a crime being brought to justice, and in a prosecution once commenced being determined in due course of law."[21] The seizure must be simultaneous with and growing naturally out of the arrest, but the fact that no search warrant is issued seems immaterial.[22] If, therefore, the *dictum* of the Supreme Court is not read with reference to its particular circumstances, the language may prove, as shown by the principal case, a misleading test of reasonableness.

THE "NET VALUE" OF A LIFE INSURANCE CONTRACT. — On the average, twelve out of every thirteen life insurance policies are surrendered or forfeited for the non-payment of premiums.[1] In case of forfeiture

[11] See Entick *v.* Carrington, *supra*; Money *v.* Leach, 3 Burr. 1742.

[12] The Fourth Amendment is probably not a limitation on the power of the states. Barron *v.* City of Baltimore, 7 Pet. (U. S.) 243. See COOLEY, CONST. LIM., 6 ed., 29. But see Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541, 553.

[13] Stockwell *v.* United States, 3 Cliff. (U. S.) 284.

[14] Joseph *v.* Levin, 128 Mo. 588 (pawnbrokers' books open to inspection).

[15] Houghton *v.* Bachman, 47 Barb. (N. Y.) 388.

[16] State *ex rel.* Milwaukee *v.* Newman, 96 Wis. 258 (gambling apparatus). See Glennon *v.* Britton, 155 Ill. 232, 245. This class of cases seems to be recognized in Boyd *v.* United States, *supra*, 623, 624.

[17] See Spalding *v.* Preston, 21 Vt. 9; State *v.* Robbins, 124 Ind. 308.

[18] See Adams *v.* New York, 192 U. S. 585, 598.

[19] An arrest without a warrant may be reasonable, as where the prisoner was committing or had freshly committed a crime. North *v.* People, 139 Ill. 81.

[20] Rex *v.* Barnett, 3 C. & P. 600; Commonwealth *v.* Dana, 2 Met. (Mass.) 329 (books of seller of lottery tickets); Smith *v.* Jerome, 47 N. Y. Misc. 22.

[21] Dillon *v.* O'Brien, 16 Cox C. C. 245, 249. See Holker *v.* Hennessey, 141 Mo. 527, 539–541.

[22] Since the papers to be seized are sufficiently designated, namely, incriminating evidence found in the prisoner's possession at the time of the arrest, there is no necessity for a search warrant. See cases in notes 20 and 21. A search warrant would not have made the search in the principal case any more reasonable under the language of Boyd *v.* United States, *supra*.

[1] This average is based on 1,525,302 policies in the Mutual, Metropolitan and Prudential Insurance Companies. See BRANDEIS, LIFE INSURANCE, 14.

the insured loses the net value of his policy. Practically all policies contain such a forfeiture clause, and if the premium is not paid when due, the policy is void.[2] This stipulation is held to be a valid condition subsequent[3] and not a mere penalty.[4] To relieve the policy holders against such forfeitures, two types of statutes have been devised. The first has been widely adopted, and merely declares that no policy shall be forfeited unless the insured has been given a written notice that his premium is due.[5] The other is more radical and has been adopted in only a few states.[6] Statutes of the latter type emphatically declare that policies shall not be forfeited for the non-payment of premiums under any circumstances, and provide that three-fourths of the net value of the policy at the time of default shall be used to purchase temporary insurance.[7] These statutes have been held to be mandatory[8] and cannot be waived by the parties.

The operation of these statutes is explained by a recent Missouri case. *Rose* v. *Franklin Life Ins. Co.*, 132 S. W. 613 (Mo.). It points out that the average policy has a level premium which remains the same from year to year while the risk of death steadily increases. In the early years of such policies when the losses are small the premiums are larger than the actual cost of insurance and a reserve is built up to meet the greater losses in the future. From this it is argued that if a loss will not accrue on a particular policy then a proportionate part of the reserve ought to be returned to the policy-holder. But while it is unquestionably true that this reserve should equal the aggregate net values of the outstanding policies, at least three reasons can be shown why each policy is not entitled to its exact *pro ratâ* share. The risks on some policies have increased more than on others. Again, to allow healthy policy-holders to retire and take a numerical proportion of the reserve with them would be to start an "adverse mortality selection" against those remaining. And again, in certain cases premiums are based on the supposition that a certain number of policies will lapse.

While these statutes are thus not justified on the theory that the insurer has a fund which rightfully belongs to the insured, they find ample justification in accomplishing one of the main purposes for which they were passed. For they have effectively eliminated "deferred dividend policies"[9] with their accompanying abuses. The theory of such policies was to form a blind pool where all policies that lapsed were to be forfeited, while at the end of a certain number of years those

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[2] Phoenix Life Assur. Co. *v.* Sheridan, 8 H. L. Cas. 745.

[3] New York Life Ins. Co. *v.* Statham, 93 U. S. 24.

[4] St. Louis Mut. Life Ins. Co. *v.* Grigsby, 10 Bush (Ky.) 310.

[5] In England the INDUSTRIAL ASSURANCE COMPANIES ACT, 1896, § 16 applies the rule to industrial companies. In Canada, 60 VICT. c. 36, § 148 gives the insured thirty days' grace in which to pay. In the United States sixteen states have required that there shall be no forfeiture without a notice. See RICHARDS, INSURANCE, 705.

[6] Massachusetts passed the original statute in 1860. MASS. LAWS 1861, c. 186. Missouri copied it in 1879. REV. ST. MO. 1879, § 5983. New York, Colorado, California, Maine, and Michigan have adopted similar ones.

[7] The Missouri statute provides: "The net value of the policy, when the premium becomes due, and is not paid, shall be computed upon the actuaries' or combined experience table of mortality with four per cent interest, per annum."

[8] New York Life Ins. Co. *v.* Cravens, 178 U. S. 389.

[9] See BRANDEIS, LIFE INSURANCE, 20.

that survived were to divide the fund thus collected. Though aimed at these policies, these statutes were held to apply to all policies that had a reserve and so to cover the type in the principal case.[10] This policy was a "preliminary term policy," on which the premiums for the first five years were very low. The plaintiff contended that though the premium was low, the net value was not less and therefore had been sufficient to buy temporary insurance to the insured's death. But the court correctly held that the amount of the reserve was based entirely on the actuarial value; so the policy had lapsed.

THE LIABILITY OF FOREIGN EXECUTORS AND ADMINISTRATORS. — The general principle is well settled that a foreign executor or administrator is not liable in his official capacity, even though he consents to be sued.[1] The language of some cases laying down this rule would indicate that a different one is somehow impossible; but it must be evident there is no more difficulty in recognizing foreign created rights against a representative than against any one else. The underlying reason for the rule appears to be that each state, to guard its own citizens, wished to administer a decedent's property within its bounds, so refused to give it to a foreign representative.[2] After this refusal it felt bound by consistency to decline to hold him. This result is unnecessary, for the right to that property claimed by him and the rights asserted against him are the creations of different laws. In refusing to allow a foreign representative to take domestic property the universal principle of the law of the *situs* determining the title and custody is followed. In declining to allow him to be sued as administrator of the property situated in the jurisdiction of his appointment, the extraordinary doctrine is applied of refusing to recognize and enforce foreign created liabilities. There would be no danger of conflict between the jurisdictions in such an action, for the law of his appointment would always determine the existence and extent of liability.[3] And many states do allow a foreign representative to be sued in cases where such a result is particularly desirable.[4] Thus when he resides in the state of suit or when he there has property of the foreign estate, a suit against him may be maintained.[5] The remedy in some of these cases is to hold the foreign representative as constructive trustee, but the trust must be based ultimately on his liability as administrator. To hold him as executor *de son tort* of the goods he received in the foreign jurisdiction is unsound, for those goods he received rightfully. The exceptional circumstances above mentioned are not everywhere essential to suit against a foreign representative. By statute in a few states a foreign executor or administrator may be sued like any non-resident.[6]

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[10] See Mutual Reserve Life Ins. Co. *v.* Roth, 122 Fed. 853.

[1] Elting *v.* First National Bank, 173 Ill. 368.

[2] See STORY, CONFLICT OF LAWS, § 512.

[3] Hoskins *v.* Sheddon, 70 Ga. 528.

[4] See Courtney *v.* Pradt, 135 Fed. 818, 823,

[5] Colbert *v.* Daniel, 32 Ala. 314; Whittaker *v.* Whittaker, 10 Lea (Tenn.) 93. *Contra*, Hedenberg *v.* Hedenberg, 46 Conn. 30. *Cf.* Falke *v.* Terry, 32 Colo. 85.

[6] GEN. STAT., KANSAS, § 3078.

And in at least two more, practically the same result has been reached without legislative aid.[7]

Liabilities assumed by an executor or administrator after taking office are primarily his personal obligations.[8] Here the law follows its usual course in recognizing foreign created rights and obligations and allows him to be sued on them wherever found.[9]

The common remedy to-day for violation of duty by an executor or administrator is a proceeding on the administration bond. In a recent case in which the right to sue on a foreign probate bond was involved, the suit was allowed, but only on the ground that the misappropriated property was in that jurisdiction. *Cutrer* v. *State of Tennessee ex rel. Leggett*, 54 So. 434 (Miss.). The chief objection to such a suit would be that it involved a determination by another court than that having charge of the estate, whether there had been a breach of duty. But the foreign law on this point can be as easily determined as on any other.[10] And as the parties are evidently bound in their personal capacity it would seem that though there were no such exceptional circumstances as in the principal case, such a suit might be maintained even under the prevailing law.[11]

Application of Principles of Suretyship to Bills and Notes. — Two recent decisions, indefensible under the strict law of bills and notes, raise interesting questions as to the applicability of certain principles of suretyship law. In a Pennsylvania case where a deed of trust to a third person of all of a company's property was executed to secure the anomalous indorsers [1] on a demand note made by the company, the court held that, without any prior demand on the company, these indorsers could be charged on the note, as they had become the principal debtors. *In re Alldred's Estate* (*No. 1*), 79 Atl. 141 (Pa.).[2] An indorser's liability is secondary, and can only be fixed by proper notice of dishonor.[3] But where he is, or becomes, substantially the principal debtor, it seems fair that he should no longer take refuge behind the form of his secondary liability.[4] The maker and indorser may be regarded as having exchanged positions; and such an exchange of positions is well recognized in the law of suretyship.[5]

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[7] Laughlin & McManus *v.* Solomon, 180 Pa. St. 177; Keiningham *v.* Keiningham's Ex'r, 24 Ky. L. Rep. 1330.

[8] Sheperd *v.* Young, 8 Gray (Mass.), 152.

[9] Johnson *v.* Wallis, 112 N. Y. 230.

[10] See Tunstall *v.* Pollard, 11 Leigh (Va.), 1, 28.

[11] See Johnson *v.* Jackson, 56 Ga. 326.

[1] The principal case also holds that under the Negotiable Instruments Law, §§ 63 and 64 (Pa. Laws, 1901, p. 194), an anomalous indorser is an indorser. *Accord*, Baumeister *v.* Kuntz, 53 Fla. 340. *Contra*, Mercantile Bank *v.* Busby, 120 Tenn. 652. An accommodation indorser is entitled to strict notice. French's Executrix *v.* Bank of Columbia, 4 Cranch (U. S.), 141.

[2] *Accord*, Coddington *v.* Davis, 3 Den. (N. Y.) 16; Barrett *v.* Charleston Bank, 2 McMull. (S. C.) 191. *Contra*, Creamer *v.* Perry, 17 Pick. (Mass.) 332; Selby's Admr. *v.* Brinkley, 17 S. W. 479 (Tenn.).

[3] Negotiable Instruments Law, § 66, cl. 2.

[4] Corney *v.* Da Costa, 1 Esp. 301; Bond *v.* Farnham, 5 Mass. 170. See Brown *v.* Maffey, 15 East 216, 223; Denny *v.* Palmer, 5 Ired. (N. C.) 610, 625.

[5] Chaplin *v.* Baker, 124 Ind. 385.

The difficulty lies in determining when this has taken place. Where there is an express contract between the maker and indorser that the latter will assume the primary liability, this result is reached.[6] So also it may be worked out from all the circumstances, as where the note is made for the accommodation of the payee-indorser,[7] or where he receives a sum of money for the avowed purpose of taking up the debt.[8] But suretyship law does not go much beyond that point, and to do so in the case of an indorser would be even more difficult than in most cases of suretyship.[9] Therefore, where the indorser receives property from the maker, merely as security, whether it be sufficient to cover the amount of the note,[10] or whether it be all the maker's property,[11] it cannot be said that by that he has undertaken the primary liability.[12] He has shown no intention to give up his contract as indorser. Moreover, he cannot have recourse to the security in his hands until he has been properly charged.[13] So the argument that he will not be harmed in such a situation by failure to receive proper notice of dishonor assumes the very point to be proved, namely, that his liability has been properly fixed so that he can realize on the security.[14] Yet many cases in this country have relaxed the rule requiring notice of dishonor, some presuming an assumption of primary liability from insufficient data,[15] and others apparently making no attempt to proceed on any principle.[16] But the better authority, and certainly the correct principle, is, that, to find an assumption of primary liability, something more must be shown than the bare fact that the indorser received all the maker's property, even though sufficient to cover the note.[17] So this Pennsylvania case would seem to have gone very far, for a transfer to a trustee [18] "to secure the indorser" would rather raise the contrary presumption that the parties intended the indorser to retain his secondary liability.[19]

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[6] Marshall *v.* Mitchell, 35 Me. 221. *Contra*, Baker *v.* Birch, 3 Campb. 107.

[7] Brown *v.* Maffey, *supra*.

[8] Wright *v.* Andrews, 70 Me. 86.

[9] An indorser is originally bound on a separate contract from that of the maker, whereas a surety is oftenest bound on the same contract as the principal is. Converse *v.* Cook, 25 Hun (N. Y.) 44.

[10] Kramer *v.* Sandford, 4 Watts & S. (Pa.) 328; Whittier *v.* Collins, 15 R. I. 44. *Contra*, Develing *v.* Ferris, 18 Oh. 170.

[11] Haskell *v.* Boardman, 8 Allen (Mass.) 38; Watkins *v.* Crouch & Co., 5 Leigh (Va.) 522. *Contra*, State Bank *v.* Myers, 1 Bailey (S. C.), 412. Most of the authorities *contra* insist that the property must also be sufficient to cover the amount of the note. Bank *v.* McGuire, 33 Oh. St. 295; Woodbury *v.* Crum, 1 Biss. (U. S.) 284. But this distinction seems immaterial, for in either case it is only security.

[12] Wilson *v.* Senier, 14 Wis. 380. *Contra*, Mead *v.* Small, 2 Me. 207.

[13] Dufour *v.* Morse, 9 La. 333; Oswego Bank *v.* Knower, Hill & D. (N. Y.) 122. And if he pays before he is properly charged, he has no right to the security. Roscow *v.* Hardy, 12 East 434.

[14] See 2 DANIELS, NEGOTIABLE INSTRUMENTS, § 1134. Moreover this argument is immaterial, for the court has no right to remake the indorser's contract. An indorser with knowledge of the maker's insolvency is still entitled to demand and notice, though he would not be harmed if notice were not given. Nicholson *v.* Gouthit, 2 H. Bl. 609; Jackson *v.* Richards, 2 Caines (N. Y.) 343.

[15] *Cf.* Bond *v.* Farnham, *supra*; Mechanics Bank *v.* Griswold, 7 Wend. (N. Y.) 165.

[16] *Cf.* Hull *v.* Myers, 90 Ga. 674, 678; Walker & Faulkner *v.* Walker, 7 Ark. 542.

[17] Ray *v.* Smith, 17 Wall. (U. S.) 411; Moses *v.* Ela, 43 N. H. 557.

[18] Denny *v.* Palmer, *supra*. See 2 DANIELS, NEGOTIABLE INSTRUMENTS, § 1141.

[19] But it has been held that the fact that the indorsers were directors of the company which made the note disentitled them to notice. Hull *v.* Myers, *supra*.

In a Texas case a bank, an indorsee in due course of a note, learned of fraud and failure of consideration between the original parties. At maturity it had in its hands sufficient deposits of the payee-indorser to cover the note. It was not allowed to recover against the maker. *Union National Bank* v. *Menefee*, 134 S. W. 822 (Tex., Ct. Civ. App.).[20] Under these facts the payee-indorser should ultimately pay the amount of the note. So here again he may be regarded as substantially the principal debtor with the maker as surety. By suretyship law, the creditor must in certain cases take some slight affirmative action against the principal.[21] And the better view would seem to be that where, as in this case, the creditor has merely to charge the amount of the debt against the principal on its books, and where such action is of vital importance to the surety, the creditor's failure to act will discharge the surety.[22] The only safe thing for the holder to do, therefore, is, upon any suspicion of a defense between the original parties, to assert at maturity its lien over the payee's funds.[23]

RECENT CASES.

ACCRETION — APPLICABILITY TO WATERS ACTUALLY NON-NAVIGABLE. — The coast lands of the plaintiff and the defendant were divided by an inlet. The maximum depths of its channel were seven feet at high tide, and three feet at low. It shifted laterally at the rate of four hundred feet each year, so that it ran through the defendant's land; the process being one of erosion on one side of the inlet and deposit of sand on the other. *Held*, that the plaintiff has no title to the strip between the former and present channels of the inlet. *Town of Hempstead* v. *Lawrence*, 70 N. Y. Misc. 52 (Sup. Ct.).

Common-law courts have advanced at least seven distinct grounds for the right of acquiring land by accretion: (1) *De minimis non curat lex*. See 2 BL. COMM. 262; *Lovingston* v. *County of St. Clair*, 64 Ill. 56, 59. But by accretion *minima* become *magnum*. See *Attorney-General* v. *Chambers*, 4 De G. & J. 55, 68. (2) It is impossible to identify small additions to land daily. See *Foster* v. *Wright*, 4 C. P. D. 438, 446. (3) The law disregards things of imperceptible growth. See *In the Matter of the Hull & Selby Ry.*, 5 M. & W. 327, 333. (4) Acquisition of title by accretion compensates for loss of title by erosion. See 2 BL. COMM. 262; *Peuker* v. *Canter*, 62 Kan. 363, 372. (5) It is compensation for the expense of preventing erosion. See *Gifford* v. *Yarborough*, 5 Bing. 163, 166. *Contra*, *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122, 228, 243. (6) Changing a littoral into an inland owner is inequitable. See *Steers* v. *City of Brooklyn*, 101 N. Y. 51, 56; *Lamprey* v. *State*, 52 Minn. 181, 197. (7) Otherwise there would be numberless unoccupied littoral gores. See *Gifford* v. *Yarborough*, *supra*. Based upon any of these grounds, the doctrine can apply to waters actually non-navigable. And decisions have so ap-

[20] This doctrine seems to be law only in Texas. Van Winkle Gin & Machinery Co. *v.* Bank, 89 Tex. 147. *Contra*, Sloan *v.* Union Banking Co., 67 Pa. St. 470; Hoge *v.* Lansing, 35 N. Y. 136. See Bank *v.* Peltz, 176 Pa. St. 513, 518.

[21] See 1 BRANDT, SURETYSHIP, §§ 487, 494, 495, 498, 501–505.

[22] McDowell *v.* Bank, 1 Har. (Del.) 369; Commercial Nat. Bank *v.* Henniger, 105 Pa. St. 496. *Contra*, Strong *v.* Foster, 17 C. B. 201; Voss *v.* German American Bank, 83 Ill. 599.

[23] See 9 HARV. L. REV. 146.

plied it. *Niehaus* v. *Shepherd*, 26 Oh. St. 40; *Foster* v. *Wright*, *supra*. But if in the principal case the shifting of the inlet was perceptible moment by moment, the decision is correct. *Mulry* v. *Norton*, 100 N. Y. 424. See BRACTON, 2. 2. 1.

BANKRUPTCY — JURISDICTION OF FEDERAL COURTS — SUMMARY PROCEDURE. — Just before the filing of a petition in bankruptcy the treasurer of the bankrupt corporation took money of the corporation and left the jurisdiction of the bankruptcy court. He returned a year later. The referee found that he had a part of the money still in his possession, though he denied this. *Held*, that the bankruptcy court may make a summary order that he turn over this money to the trustee. *In re Meier*, 27 Am. B. Rep. 272 (C. C. A., Eighth Circ.).

The Bankruptcy Act allows summary procedure to compel a bankrupt to turn over to his trustee property in his possession. BANKRUPTCY ACT OF 1898, § 2 (7), (13). It was a slight extension to allow such procedure against an agent of the bankrupt. *Mueller* v. *Nugent*, 184 U. S. 1. See *In re Wells*, 114 Fed. 222. But the federal cases, following the *dictum* of the Supreme Court in the case cited, have gone to this extent: In the case of any fraudulent conveyance or preference the trustee may petition for a summary order against the party benefited. The petition should allege that the defendant has but a colorable claim. *In re Scherber*, 131 Fed. 121; *In re Michie*, 116 Fed. 749. If the referee finds that the defendant has the property in his possession and has no substantial claim to it, he may order it to be handed over. *In re Kane*, 131 Fed. 386. *Cf. In re Laplane Condensed Milk Co.*, 145 Fed. 1013. The present case is within this rule. But if the defendant sets up a claim of title to the property and supports it by some evidence, there can be no summary order, even though the referee is convinced that the claim is fraudulent. *Jaquith* v. *Rowley*, 188 U. S. 620; *Cooney* v. *Collins*, 176 Fed. 189. But see *In re Knickerbocker*, 121 Fed. 1004, 1006. The rule even so limited is without statutory foundation, and must be regarded as judicial legislation.

BANKRUPTCY — PARTNERSHIP AND INDIVIDUAL CLAIMS AND ASSETS — ENTITY THEORY. — A partnership and the partners were in bankruptcy. The partnership estate proved against the individual estate of a partner on a note. *Held*, that no dividend can be paid on this claim till all the individual creditors of that partner have been paid. *In re Telfer*, 184 Fed. 224 (C. C. A., Sixth Circ.).

A partnership and the partners were in bankruptcy. The estate of a partner proved against the partnership estate for money lent. *Held*, that no dividend can be paid on this claim till all the creditors of the partnership have been paid. *In re Effinger*, 184 Fed. 728 (Dist. Ct., D. Ind.).

These cases are in accord with previous authority in their construction of the provisions of the Bankruptcy Act regarding the administration of the estates of bankrupt partnerships. *In re Rice*, 164 Fed. 509. See *In re Denning*, 114 Fed. 219, 221; *In re Henderson*, 142 Fed. 588, 590. They decide that § 5 *f*, stating the old rule, giving partnership assets to partnership creditors, individual assets to individual creditors, and any surplus from either estate to the creditors of the other, governs the distribution, and that § 5 *g* allowing the partnership and individual estates to prove against each other, merely explains a method for distributing the surplus. The result is thus the same as that reached under the Act of 1867, which had no section corresponding to § 5 *g* of the present act. See *Amswick* v. *Bean*, 22 Wall. (U. S.) 395, 402. The Act of 1898 adopts in a general way the entity theory of partnership. BANKRUPTCY ACT OF 1898, §§ 1 (19), 5 *a*. See *In re Bertenshaw*, 157 Fed. 363, 365. The federal courts might have carried out the theory more logically by giving § 5 *g* the effect of making the individual and partnership estates creditors of each other,

and allowing them dividends as ordinary creditors under § 5 *f*, and not merely allowing them the surplus. But state courts which affirm that a partnership is an entity refuse to allow suits at law between a firm and its partners. *Kalamazoo Trust Co.* v. *Merrill*, 159 Mich. 649. See *Robertson* v. *Corsett*, 39 Mich. 777, 784.

BILLS AND NOTES — DEFENSES — EXCUSE FOR FAILURE TO GIVE NOTICE OF DISHONOR. — The defendants' testator, a director of a company, became an anomalous indorser on two of the company's notes, payable on demand to the plaintiff. To secure the anomalous indorsers a deed of trust to a third person of all the company's property was executed. Without any prior demand on the company, the plaintiff sued the director's estate on these notes. *Held*, that he may recover. *In re Alldred's Estate* (*No. 1*), 79 Atl. 141 (Pa.). See NOTES, p. 665.

BILLS AND NOTES — DOCTRINE OF PRICE *v.* NEAL — RECOVERY OF PAYMENT BY DRAWEE ON FORGED BILL. — The plaintiff bank paid a forged check drawn on it, to the defendant, a holder in due course. The defendant did not change his position. *Held*, that the plaintiff may recover the payment. *American Express Co.* v. *State National Bank*, 113 Pac. 711 (Okl.).

The great weight of authority denies recovery in such a case. *Price* v. *Neal*, 3 Burr. 1354; *National Park Bank* v. *Ninth National Bank*, 46 N. Y. 77. This court applied the doctrine that a recovery may be allowed of money paid through a mistake of fact. But that equitable doctrine ought not to apply unless some reason exists for equitable interference. See 4 HARV. L. REV. 279, 299. Since both parties here are innocent and each has given value on the faith of the signature, to allow recovery merely shifts the burden to a person who has an equal equity with the plaintiff. The rule of *Price* v. *Neal* follows accurately the doctrine of mistake of fact, and furthermore increases the security of holders in due course.

BILLS AND NOTES — PURCHASERS FOR VALUE WITHOUT NOTICE — KNOWLEDGE AT TIME OF BRINGING SUIT OF EQUITABLE DEFENSE. — A bank, the holder in due course of a note, learned of fraud and failure of consideration between the original parties. At maturity, it had in its hands sufficient general deposits of the payee-indorser to pay the note. But the bank sued the maker. *Held*, that it cannot recover. *Union National Bank* v. *Menefee*, 134 S. W. 822 (Tex., Ct. Civ. App.). See NOTES, p. 665.

CARRIERS — DISCRIMINATION AND OVERCHARGE — CARLOAD RATES TO FORWARDING AGENTS. — A railroad had lower rates for carload lots than for less than carload lots, and made a rule denying the advantages of this to forwarding agents who had been combining small shipments into carload lots and shipping at the lower rate. The Interstate Commerce Commission decided that this rule was unjust and discriminatory. *Held*, that its decision is correct. *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western R. Co.*, 31 Sup. Ct. Rep. 392.

The Supreme Court rests its decision on the ground that a common carrier has no right to make the ownership of goods the criterion by which its charge for carriage shall be measured. This is a necessary corollary of the rule that rates must depend upon the cost of service, and is in itself unanswerable. But it leaves a serious part of the problem untouched. If forwarding agents can be regarded as dealers in transportation they are competitors of the railroads, and it would seem unfair that they should take advantage of the railroads' carload rates to gain for themselves their less than carload business. *Johnson* v. *Dominion Express Co.*, 28 Ont. 203; *Lindquist* v. *Grand Trunk Western Ry.*

Co., 121 Fed. 915. See *California Commercial Association* v. *Wells, Fargo & Co.*, 14 Interst. C. Rep. 422, 434; *Export Shipping Co.* v. *Wabash R. Co.*, 14 Interst. C. Rep. 437, 440. It is submitted, however, that the forwarding agents' real function is the collection and distribution of small shipments. For that they deserve compensation, and in that they are taking no unfair advantage of the railroads when they apply for carriage as members of the great body of shippers who must be served at reasonable and non-discriminatory rates.

CHOSES IN ACTION — WHAT MAY BE ASSIGNED — ASSIGNMENT OF TORT ACTION. — The plaintiff in an action for assault assigned the moneys which he might recover to a third person for a valuable consideration. The moneys recovered were attached at the suit of creditors of the assignor by garnishment. *Held*, that the assignee of the moneys obtained no rights by the assignment. *Webber* v. *Gaffin*, 9 East. L. Rep. 277 (Nova Scotia, Sup. Ct., Jan. 7, 1911).

The general statement of the law is that only those rights of action which survive the person may be effectively assigned. See *Zabriskie* v. *Smith*, 13 N. Y. 322; 3 POMEROY, EQUITY JURISPRUDENCE, § 1275. At common law, all actions arising *ex delicto*, and some *ex contractu*, notably for breach of promise of marriage, died with the party injured. *Chamberlain* v. *Williamson*, 2 M. & S. 408. See WILLIAMS, EXECUTORS, 10 ed., 606. By the statute 4 Edw. III., c. 7, it was enacted that an executor might sue for injuries to the personal property of the deceased. So, in accordance with the principle above stated, an assignment of a right to sue in trespass or trover is valid. *North* v. *Turner*, 9 Serg. & R. (Pa.) 244; *Jordan* v. *Gillen*, 44 N. H. 424. For the same reason, a right of action based on a wrong to the person could not be assigned. *Pulver* v. *Harris*, 52 N. Y. 73 (assault); *Hunt* v. *Conrad*, 47 Minn. 557 (false imprisonment). *Cf. Howard* v. *Crowther*, 8 M. & W. 601 (seduction). A judgment obtained in a tort action is assignable on the theory that the claim has become a debt. *Williams* v. *West Chicago St. Ry.*, 199 Ill. 57. Modern statutes have effected a great relaxation in the law. In England the Judicature Act (1873), § 25 (6), makes all choses in action assignable. But see *May* v. *Lane*, 64 L. J. Q. B. 236. The same result has been attained in this country by enactments providing for the survival of personal actions. *Gray* v. *McCallister*, 50 Ia. 497 (malicious prosecution); *Stewart* v. *Lee*, 70 N. H. 181 (breach of promise of marriage).

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — NEW YORK WORKMEN'S COMPENSATION ACT. — A New York statute provided that for all personal injuries sustained by workmen in eight dangerous employments, the employer should be liable for compensation, unless the injury be "caused in whole or in part by the serious and willful misconduct of the workman." The statute fixed a scale of compensation, by which a multiple of the daily earnings of the workman was recoverable for death, and a fraction for each day of disability. *Held*, that the statute violates the "due process of law" clause in the State Constitution. *Ives* v. *South Buffalo Ry. Co.*, 201 N. Y. 271. See NOTES, p. 647.

CONSTITUTIONAL LAW — IMPAIRMENT OF THE OBLIGATION OF CONTRACTS — VALIDITY OF STATUTE PROHIBITING LIMITATION ON SUITS. — The plaintiff took out an insurance policy in the defendant company, the policy providing that action on it must be brought within six months after the loss. A statute was later passed making invalid provisions in policies limiting to less than a year the time within which suits must be brought. A loss then occurred and the plaintiff brought action more than six months afterwards. *Held*, that the plaintiff can recover, the statute not impairing the obligation of the con-

tract. *Smith & Marsh* v. *Northern Neck Mut. Fire Ass'n*, 70 S. E. 482 (Va.).

It has been frequently held that the obligation of a contract is not impaired by a statute affecting only the remedy allowed, provided that an adequate remedy remain. *Swan* v. *Mutual Reserve Fund Life Ass'n*, 155 N. Y. 9. See *Sturges* v. *Crowninshield*, 4 Wheat. (U. S.) 122, 200. Statutes of limitation commonly limit the time within which litigants in a particular jurisdiction must sue on their claims, so merely go to the remedy. *Townsend* v. *Jennison*, 9 How. (U. S.) 407. Yet where the contract itself provides a time within which suit must be brought, such a provision must necessarily be substantive, and not concerned merely with the mode of procedure which a particular sovereign will allow. *Cf. The Harrisburg*, 119 U. S. 199. Thus in the principal case technically the substance of the contract, not merely the remedy, is affected. Yet, in laying down the rule that the remedy may be changed without impairment of the contract, courts are probably not limiting the use of the word "remedy" to its strict sense, but are referring to the general procedure on the contract as distinguished from its gist. See *Curtis* v. *Whitney*, 13 Wall. (U. S.) 68.

Constitutional Law — Personal Rights — Involuntary Servitude. — A North Carolina statute provided that any person who, with intent to defraud, obtained money upon an agreement to work, and failed to complete the work according to the contract, without a lawful excuse, should be guilty of a misdemeanor. This was amended by a provision that the failure to comply with such an agreement should be presumptive evidence of the intent to defraud when the agreement was made, subject to rebuttal. *Held*, that the amendment violates the Due Process clause of the federal Constitution. *State* v. *Griffin*, 70 S. E. 292 (N. C.).

The principal case, though holding the statute unconstitutional under the Fourteenth Amendment, is based on the opinion accompanying a recent decision of the Supreme Court which held a similar statute bad under the Thirteenth Amendment. *Bailey* v. *Alabama*, 31 Sup. Ct. Rep. 145. For a discussion of the principles involved in that case, see 24 Harv. L. Rev. 391.

Constitutional Law — Personal Rights — Whether Corporations Are Entitled to Privilege against Self-incrimination. — A *subpoena duces tecum* was issued out of a federal court addressed to a New York corporation to compel it to bring its books and papers before a grand jury, which was investigating certain alleged violations of the customs laws of the United States by the corporation. The corporation resisted the *subpoena* on the ground that it compelled it to incriminate itself in violation of the Fifth Amendment of the Constitution of the United States. *Held*, that the corporation must obey the *subpoena*. *In re Borun Hat Co.*, 184 Fed. 506 (Circ. Ct., S. D. N. Y.).

A corporation is not a "citizen" within the meaning of Art. IV, § 2, of the Constitution. *Paul* v. *Virginia*, 8 Wall. (U. S.) 168. But corporations are entitled to all privileges given by the Constitution which are appropriate. Thus they are protected by the Fourteenth Amendment and the last two clauses of the Fifth Amendment from being improperly deprived of property. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 325, 336. See *Sinking-Fund Cases*, 99 U. S. 700, 718; *Santa Clara County* v. *Southern Pacific R. Co.*, 118 U. S. 394. Although the statement in the principal case that corporations are not within the Fifth Amendment seems therefore too broad, the Supreme Court have announced their opinion, though entirely *obiter*, that corporations are not within the clause against self-incrimination. See *Hale* v. *Henkel*, 201 U. S. 43, 74. As regards oral testimony, this clause may well be inapplicable to corporations, since an agent cannot refuse to testify on the

ground of incriminating his principal, even though it is a corporation. *Gibbons* v. *Waterloo Bridge Co.*, 5 Price, 491; *U. S. Express Co.* v. *Henderson*, 69 Ia. 40. But compelling the production of incriminating documents may violate the Fifth Amendment. *Boyd* v. *United States*, 116 U. S. 616. See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 431, note. Therefore, if the production of documents can be a corporate act, there seems to be no reason, in its nature, why the privilege against self-incrimination must not be extended to corporations. *Logan* v. *Pennsylvania R. Co.*, 132 Pa. St. 403; *Davies* v. *Lincoln Nat. Bank*, 4 N. Y. Supp. 373. See *In re Pacific Railway Commission*, 32 Fed. 241, 250, 261, 267. It is submitted that the United States has no greater inquisitorial power over a state corporation than over a natural person. See dissenting opinion of Brewer, J., in *Hale* v. *Henkel*, *supra*, at p. 86.

CONSTRUCTIVE TRUSTS — MISCONDUCT BY NON-FIDUCIARIES — OBLIGATION OF PURPORTED AGENT AS TO FRAUDULENTLY ACQUIRED PROPERTY. — The plaintiff, pretending to act in behalf of the defendant, who held a deed of land under invalid tax proceedings, fraudulently procured a conveyance to himself from X, the legal owner, and brought this action to settle the title. *Held*, that the plaintiff being constructive trustee for the defendant cannot assert the legal title against him. *Robertson* v. *Board of Commissioners*, 113 Pac. 413 (Kan.).

Since this proceeding is in equity the shortest ground for decision of the case would be that one who comes into equity must come with clean hands, but the court proceeded to impose a constructive trust in favor of the defendant. Clearly such a trust should be imposed wherever the defendant is equitably entitled to the land, as, for example, where a prior defective deed had been executed to him, thus avoiding further litigation. *Rollins* v. *Mitchell*, 52 Minn. 41. And where a person fraudulently intercepts a gift intended for another by promising to hand it over if it is left to him, equity will impose a trust in favor of the intended legatee. See 20 HARV. L. REV. 403. But in the main case the defendant has no claim legal or equitable to the land as against the original owner, since his claim rests on invalid tax proceedings, and hence no trust should be imposed in his behalf. *Rogers* v. *Simmons*, 55 Ill. 76. Since the *cestui* would be subject to all prior equities against the property, such a trust would be subject to rescission by the grantor for fraud, and therefore the defendant is not in the last analysis equitably entitled to the property.

CORPORATIONS — DISTINCTION BETWEEN CORPORATION AND ITS MEMBERS — DISREGARDING CORPORATE FICTION IN ENFORCING COMMODITIES CLAUSE. — The Commodities clause of the Hepburn Act provides that "it shall be unlawful for any railroad company to transport from any state . . . to any other state . . . any article . . . manufactured, mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect . . ." A bill was brought to enjoin the defendant from transporting coal of a corporation whose stock the defendant owned, the bill alleging that the coal company was a mere instrumentality of the defendant. *Held*, that the defendant can be enjoined. *United States* v. *Lehigh Valley R. Co.*, 31 Sup. Ct. Rep. 387.

In proceedings originally brought against the defendant the complaint merely alleged that the defendant owned stock in the coal company whose goods it was transporting. This was held not to violate the statute, the court interpreting the "interest direct or indirect," which a carrier was forbidden to have in the transported goods to mean only a legal or equitable interest. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366. In the present amended complaint it was further alleged that the defendant was merely using the coal company as an instrumentality to evade the law. It is within the jurisdiction of equity to

enjoin the unconscionable use of a legal right. *Clement* v. *Wheeler*, 25 N. H. 361. Thus where the corporate device is employed to do something which the shareholders could not do, courts may disregard the fiction that the corporation is an independent person, and enjoin the continuance of such action. *United States* v. *Milwaukee Refrigerator Transit Co.*, 142 Fed. 247; *Northern Securities Co.* v. *United States*, 193 U. S. 197. In the principal case, upon disregarding the corporate fiction of the coal company it appears that in substance the defendant is transporting its own goods.

CORPORATIONS — TORTS AND CRIMES — LIABILITY FOR SLANDER OF AGENT. — The plaintiff in his declaration alleged, in substance, that an agent of the defendant corporation, in the course of his business, slandered the plaintiff, but he did not allege that the defendant authorized the slander. *Held*, that the declaration discloses no cause of action. *Jackson* v. *Atlantic Coast Line R. Co.*, 69 S. E. 919 (Ga.).

There is a conflict of authority on the question whether any principal is liable for the slander of his agent, not authorized by him. See 23 HARV. L. REV. 304. And where the principal is a corporation, some cases deny its liability on the ground that it has not the capacity to commit this particular tort. See *Behre* v. *National Cash Register Co.*, 100 Ga. 213, 214. But, it is submitted, there is no sound reason why a corporation should not be held; and some authorities take this view. See *Empire Cream Separator Co.* v. *De Laval Dairy Supply Co.*, 75 N. J. L. 207.

ELECTIONS — CONSTITUTIONALITY OF COMMON PROVISIONS IN PRIMARY ELECTION ACTS. — A statute provided that unless the aggregate vote cast for all candidates for nomination on a party ballot for one office should equal twenty per cent of the vote cast by that party for governor at the last general election, such party should not have a party nominee for that office on the official ballot. *Held*, that the act is constitutional. *State ex rel. McGrael v. Phelps*, 128 N. W. 1041 (Wis.).

A statute provided that unless the aggregate vote cast for all candidates for a particular office at the primary should equal thirty per cent of the number of votes cast by that party for secretary of state at the last general election, no nomination should be made by that party for such office. *Held*, that the act is unconstitutional. *State ex rel. Dorval* v. *Hamilton*, 129 N. W. 916 (N. D.). See NOTES, p. 659.

ELECTIONS — ELECTION CONTEST — DISCONTINUANCE OF SUIT. — A statute provided that an election might be contested by any thirty voters who should file a petition in the Supreme Court. A petition signed by thirty-one voters was filed, but, before issue joined, two petitioners moved to discontinue the suit as to them. A motion to amend by adding other petitioners was denied, and the suit dismissed. *Held*, that the court lost jurisdiction of the cause by the withdrawal of the two petitioners, and the suit was properly dismissed. *Bright* v. *Fern*, 20 Haw. 325.

The result reached here is at variance with the few authorities that bear on the question involved. It is generally held that an election contest is not an adversary proceeding, but a matter in the outcome of which the public has an interest. *Minor* v. *Kidder*, 43 Cal. 229; *Coppock* v. *Bower*, 4 M. & W. 361. See MCCRARY, ELECTIONS, § 454. This view is most reasonable, as the statutory remedy has been held to supersede the common-law proceeding of *quo warranto*. *Parks* v. *State*, 100 Ala. 634; *Commonwealth* v. *Leech*, 44 Pa. St. 332. The right of the remaining petitioners to continue the contest is supported by two lines of reasoning. The first class of cases holds that jurisdiction of the cause attaches at the filing of the petition and is not ousted by the subsequent

withdrawal of several petitioners, even though there remain less than the number requisite to start the action. *In re Election of Prothonotary*, 3 Pa. L. J. 160. More sound seems the reasoning of those cases which hold that an election contest is a matter of public interest, not to be frustrated by a few, and hence it is proper for the court to deny those few leave to discontinue, lest by such discontinuance the court lose jurisdiction. *Contested Election of Grim*, 14 Wkly. Notes Cas. (Pa.) 303. *Cf. Mann* v. *Cassidy*, 1 Brewst. (Pa.) 11, 43.

ESTOPPEL — ESTOPPEL IN PAIS — ESTOPPEL OF ONE WHO ACTS IN A REPRESENTATIVE CAPACITY. — The defendant, being insolvent, executed a deed of trust preferring certain creditors. One of these creditors, a corporation, signed the deed through the plaintiff, its vice-president. The plaintiff was himself a creditor of the defendant. *Held* (by an equally divided court), that he is estopped to attack the deed. *Forbes* v. *Bowman*, 70 S. E. 165 (S. C.).

Purporting to act in a representative capacity implies three statements by the actor as an individual the truth of which he cannot deny: (1) the fact of acting as a representative; (2) the right so to act; (3) the absence, so far as he knows, of a property right in another which the transaction supposes to be in the person represented. Beyond that his acts are those of another, he being merely an "assistant." Unless his conduct amounts to a representation as to his own relation to the subject-matter, he cannot be charged, as an individual, with the acts done. *Wright* v. *De Groff*, 14 Mich. 164. If it is such a representation, it creates a personal estoppel. Thus an agent selling property represents that in so far as he knows he has himself no title in it, and so may not assert such a title against the grantee if it existed before the sale. *American Freehold Land Mortgage Co.* v. *Walker*, 119 Ga. 341. But he may, if it was subsequently acquired. *Chapman* v. *Gates*, 54 N. Y. 132. In the principal case, all the representations implied from the plaintiff's signing the deed were true. His "assisting" the corporation to sign the deed was no representation as to his own position regarding the deed. Nor could his silence be regarded as such a representation to the defendant, since the only duty to speak which he might have existed toward his principal and not toward the debtor or the other creditors.

EXECUTORS AND ADMINISTRATORS — ADMINISTRATION BONDS — LIABILITY OF FOREIGN ADMINISTRATOR. — A Tennessee administrator removed funds of the estate to Mississippi, where he resided, and failed to account for them. In Mississippi suit on the Tennessee administration bond was begun against him and his sureties. *Held*, that the suit may be maintained. *Cutrer* v. *State of Tennessee ex rel. Leggett*, 54 So. 434 (Miss.). See NOTES, p. 664.

FEDERAL COURTS — JURISDICTION AND POWERS IN GENERAL — ENJOINING ENFORCEMENT OF MUNICIPAL ORDINANCE. — The plaintiff sued in a federal court to enjoin the enforcement of a municipal ordinance, alleging an infringement of the Fourteenth Amendment. The state constitution likewise contained a provision against deprivation of life, liberty, or property without due process of law. *Held*, that no federal question is raised until the validity of the ordinance is sustained by the highest court of the state to which the question may be taken. *Seattle Electric Co.* v. *Seattle, Renton & Southern Ry. Co.*, San Francisco Recorder, Feb. 14, 1911 (C. C. A., Ninth Circ.).

Two lines of decisions as to the legal effect of municipal ordinances are to be found, the first holding that where an ordinance is enacted in pursuance of legislative authority, it is state action within the Fourteenth Amendment. *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 148. The other holds that a municipal ordinance not passed under supposed legislative authority cannot be regarded as state action within the constitutional prohibition. *Hamilton*

Gas Light and Coke Co. v. *Hamilton City*, 146 U. S. 258. The decision in the main case that it is not state action until held valid by the highest court of the state is therefore unsupported by the authorities, and is due possibly to the court's failure to note that the distinction is made between authorized and unauthorized action and not between lawful and unlawful action under the state constitution. Generally one attacking unconstitutional state legislation need not first pursue his remedy in the state courts; although where a carrier complains of rates fixed by a state commission he must exhaust the remedies provided by the statute before applying to the federal courts. See 22 HARV. L. REV. 368. The main case in requiring a similar procedure in the case of municipal ordinances reaches a desirable result but is wholly unsupported by the decisions.

FEDERAL COURTS — JURISDICTION AND POWERS IN GENERAL — ORIGINAL JURISDICTION WHEN STATE IS A PARTY. — The Constitution of the United States gives the Supreme Court original jurisdiction in cases in which a state is a party. Oklahoma brought an original bill in this court to enjoin the defendant railroad from charging certain alleged excessive freight rates in Oklahoma. The railroad demurred. *Held*, that the Supreme Court here has no original jurisdiction. *State of Oklahoma* v. *Atchison, Topeka & Santa Fé Ry. Co.*, 31 Sup. Ct. Rep. 434.

The State of Oklahoma brought an original bill in the Supreme Court to enjoin numerous common carriers from shipping intoxicating liquors into Oklahoma in violation of her constitution and laws. *Held*, that the Supreme Court here has no original jurisdiction. *State of Oklahoma* v. *Gulf, Colorado & Santa Fé Ry. Co.*, 31 Sup. Ct. Rep. 437.

These cases illustrate the unsuccessful attempt of a state to employ the Supreme Court, by virtue of the broad language of the Original Jurisdiction clause of the Constitution, as a tribunal of first resort in the enforcement of its laws. No property right of the state is here sought to be protected; the real parties in interest are certain citizens, and the primary purpose is to shield them against a violation of the state laws by the defendants. A state cannot thus ask relief when it seeks chiefly to vindicate the wrongs of individuals or to enforce its laws against wrongdoers generally. *Louisiana* v. *Texas*, 176 U. S. 1, 19, 22. The second case is rested on the additional ground that the state is in substance attempting to enforce a local penal law in the courts of another jurisdiction. Such an action cannot be maintained. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265. It is clear that the practical result of a different determination of the principal cases would be to overwhelm the Supreme Court with similar litigation.

HUSBAND AND WIFE — MUTUAL RIGHTS, DUTIES, AND LIABILITIES — HUSBAND'S POWER TO DISPOSE OF COMMUNITY PROPERTY AS A VESTED RIGHT. — Under the law of New Mexico a husband had the uncontrolled power to dispose of community property. A statute declared that no future conveyance of such property should be valid unless the wife joined in the deed. It was contended that the law could not constitutionally apply to community property already acquired, as that would deprive the husband of property without due process of law. *Held*, that such construction is constitutional. *Arnett* v. *Reade*, 31 Sup. Ct. Rep. 425. See NOTES, p. 652.

INSURANCE — CONSTRUCTION AND OPERATION OF CONDITIONS — "NET VALUE" OF POLICY. — A Missouri statute provided that no life insurance policy should be forfeited for the non-payment of premiums, but that three-fourths of its net value at the time of default should be used to purchase temporary insurance. The insured died three years after default. *Held*, that the

temporary insurance, based on the net value of the original policy, had expired before his death. *Rose* v. *Franklin Life Ins. Co.*, 132 S. W. 613 (Mo.). See NOTES, p. 662.

INSURANCE — MUTUAL BENEFIT INSURANCE — LIMITATION OF ACTION. — The defendant, a mutual benefit life insurance society, promised to pay a certain sum after proof of the death of the insured while a member. The contract did not specify who was to give the proof, but required notice of death from the local to the central lodge. Action to recover the amount promised was brought fourteen and one-half years after the disappearance of the insured, eight years after the termination of his membership, and five months after proof of death was given the central by the local lodge. The latter had contemporaneous knowledge of both the disappearance and the continued absence of the insured. *Held*, that the action is not barred by the Statute of Limitations (six years). *Kelly* v. *Ancient Order of Hibernians Ins. Fund*, 129 N. W. 846 (Minn.).

In such contracts the beneficiary is not the one to perform the condition of proof of death. *Anderson* v. *Supreme Council*, 135 N. Y. 107. *Cf. Doggett* v. *United Order of the Golden Cross*, 126 N. C. 477. Therefore the local lodge must be the one to perform it, and this means that the society itself, through its agent, is to perform the condition. *Patterson* v. *United Artisans*, 43 Or. 333. Even if the condition be not performed, the beneficiary can recover the whole amount promised. *Murphy* v. *Independent Order*, 77 Miss. 830. This recovery can be had on either of two theories. The plaintiff may sue for breach of the express promise to pay, non-performance of the condition being excused by the promisor's prevention of its performance. *Jones* v. *Walker*, 13 B. Mon. (Ky.) 163; *Cape Fear Navigation Co.* v. *Wilcox*, 7 Jones (N. C.) 481. In the principal case the beneficiary had such an excuse, and therefore the right of action, more than six years before suit. Or the plaintiff may recover, in the second place, for the breach of the defendant's promise, implied in fact, to perform the condition. *Cf.* 24 HARV. L. REV. 404; *Ford* v. *Tiley*, 6 B. & C. 325. Delay in the performance of this subsidiary promise will amount in time to a repudiation of the entire contract, giving rise to an action for damages as for a complete breach. See WILLISTON, SALES, §§ 500, 500 (a), 500 (b). After such a repudiation no other right of action can accrue on the contract. *Cf. Clark* v. *Marsiglia*, 1 Den. (N. Y.) 317; *Gibbons* v. *Bente*, 51 Minn. 499. But *cf. Roebling's Sons' Co.* v. *Lock Stitch Fence Co.*, 130 Ill. 660. In the principal case such a repudiation must have occurred more than six years before suit. On either theory, therefore, the action should have been held to be outlawed.

INSURANCE — RIGHTS OF INSURER — SUBROGATION TO RIGHTS OF INSURED WHEN LOSS IS PAID WITHOUT LEGAL LIABILITY. — Owing to the defendant's fault, its vessel was obliged to deviate from its course to get coal. During the deviations it ran aground, and subsequently a lien was asserted against the cargo for salvage. The plaintiff, the insurer of the cargo, paid the salvage, though there was no provision in the policy for liability in case of deviation. The plaintiff claimed to be subrogated to the rights of the owner of the cargo, and sued the defendant for the amount paid for salvage. *Held*, that it can recover. *British & Foreign Marine Ins. Co.* v. *Kilgour Steamship Co., Limited*, 184 Fed. 174 (Dist. Ct., S. D. N. Y.).

The contention of the defendant was that the plaintiff, not being liable on account of the deviation, paid as a mere volunteer and therefore could not recover. One who officiously discharges the obligation of another cannot recover from the original obligor. *Stokes* v. *Lewis*, 1 T. R. 20. The difficulty arises, as in the principal case, in determining whether or not the payment was voluntary or officious. When a surety, without liability to do so, dis-

charges the debt, he is not subrogated to the rights of the creditor against the principal debtor. *Kimble* v. *Cummins*, 3 Met. (Ky.) 327; *Bancroft* v. *Abbott*, 3 Allen (Mass.) 524. But in limitation of this doctrine it is held that he does not lose his right to subrogation by waiving certain defenses which he may have against the creditor. *Beal* v. *Brown*, 13 Allen (Mass.) 114 (Statute of Frauds); *Shaw* v. *Loud*, 12 Mass. 447 (Statute of Limitations); *Ricketson* v. *Giles*, 91 Ill. 154 (coverture); *Simmons* v. *Goodrich*, 68 Ga. 750 (variation of risk). There seems to be no fixed rule as to the extent to which defenses may be waived, but the principal case is supported by authority in applying the principle liberally to underwriters. *Amazon Ins. Co.* v. *The Iron Mountain*, Fed. Cas. No. 270. See *Sun Mutual Ins. Co.* v. *Mississippi Valley Transportation Co.*, 17 Fed. 919, 923. It is submitted, however, that there could be no recovery if payment were made on an absolutely void policy, and that the language of the decision is very broad.

LANDLORD AND TENANT — RENT — LANDLORD'S STATUTORY LIEN. — A contract of sale of land provided that on the purchaser's failure to pay any annual instalment of the price he should pay rent for that current year, the relation of landlord and tenant should immediately arise, and the landlord's lien for rent come into being, with full right to distrain as if a contract of rental had been made at the beginning of the year. The purchaser, before his failure to pay the first instalment, mortgaged his crops to one who knew of the contract. A statute gave a landlord a lien for rent on his tenant's crops. *Held*, that the vendor has a landlord's lien superior to the mortgagee's lien. *Wilkins* v. *Fulcher*, 70 S. E. 691 (Ga., Ct. App.).

The statute might have been construed to protect a seller who has let the buyer into possession; for the latter is before the conveyance a tenant at will. *Harris* v. *Frink*, 49 N. Y. 24. *Contra*, *Griffith* v. *Collins*, 116 Ga. 420. He is liable for use and occupation, if he prevents a conveyance. *Gould* v. *Thompson*, 4 Met. (Mass.) 224. *Contra*, *Smith* v. *Stewart*, 6 Johns. (N. Y.) 46. And the statutory lien arises on an express agreement to pay for use and occupation. *Powell* v. *Hadden's Executors*, 21 Ala. 745. But the statute has been construed as not extending to the merely incidental tenancy arising from the relation of buyer and seller. *Taylor* v. *Taylor*, 112 N. C. 27. *Cf. Tucker* v. *Adams*, 52 Ala. 254. Therefore the principal case is incorrect if prior to the purchaser's default the relation was solely one of buyer and seller. *Wilczinski* v. *Lick*, 68 Miss. 596. It is correct if the contract also established an immediate relation of landlord and tenant within the meaning of the statute. *Bacon* v. *Howell*, 60 Miss. 362; *Jones* v. *Jones*, 117 N. C. 254. A contract merely requiring payment of rent upon the purchaser's failure to pay any instalment of the price has been held to create such a relation. *Collins* v. *Whigham*, 58 Ala. 438. *Cf. Thornton* v. *Strauss*, 79 Ala. 164. *Contra*, *Oxford* v. *Ford*, 67 Ga. 362. At any rate, the contract in the principal case, with its additional provisions, may be so construed. *Cf. British & American Mortgage Co.* v. *Cody*, 135 Ala. 622.

LAW AND FACT — PROVINCES OF COURT AND JURY — COMPETENCY OF WITNESS DEPENDING ON MAIN ISSUE. — On the sole issue whether the defendant was one Lee, who was admitted to have committed the murder charged, the defense offered to put Lee's wife on the stand to disprove the identity. The law of the state prohibited husband and wife from testifying for or against each other. The court refused the testimony on the ground that it believed the defendant was Lee. *Held*, that this was not error. *State* v. *Lee*, 64 So. 356 (La.).

It is well settled that questions relating to the admissibility of evidence are for the judge. *Bartlett* v. *Smith*, 11 M. & W. 483. This is so even if the question

involves determining the very point which the evidence is offered to prove. *Hichens* v. *Eardley*, L. R. 2 P. & D. 248. The principal case is the strongest test of the rule, as the inadmissibility of the wife's evidence depends in substance on the prisoner's guilt. The decision is important in that it meets the problem squarely, and does not attempt to evade the question by a vague ruling based upon the court's discretion.

LEGACIES AND DEVISES — VOID OR VOIDABLE BEQUESTS AND DEVISES — GIFT TO WIFE WHILE LIVING APART FROM HUSBAND. — A testator bequeathed stock to trustees to pay his daughter A the income during such time as her husband should be living apart from her; and in the event of their living together again, over. A's husband had deserted her and she still lived apart from him. *Held*, that the bequest contravenes no public policy and is valid. *Re Charleton*, 55 Sol. J. 330 (Eng., Ch. Div., Feb. 24, 1911).

The court, in pointing out that no illegality is here involved, lays stress on the facts that A had already been deserted by her husband and that the provision was intended, not to bring about a separation, but merely to provide for the decent maintenance of the wife until her husband should return. In the closely analogous case of restraints upon marriage, the donor's intent seems the controlling factor. But see 24 HARV. L. REV. 405. Thus a devise to a woman so long as she remains single, it appearing that the testator's object is not to prevent matrimony but only to provide for the devisee while she stays single, is valid. *Arthur* v. *Cole*, 56 Md. 100. See 14 HARV. L. REV. 614. "A purpose of intermediate maintenance will not be interpreted maliciously to a charge of restraining marriage." *Scott* v. *Tyler*, 2 Dick. 712, 722. The same rule is properly to be applied in situations such as the principal case presents. Thus it has been held that if the purpose of the gift is to induce the beneficiary to leave her husband, the provision violates public policy and the usual rules as to the effect of the illegality upon the condition or limitation apply. *Re Moore*, 39 Ch. D. 116.

MILITIA — CIVIL LIABILITY — ACTS DONE IN OBEDIENCE TO ORDERS. — The defendant, a militiaman on riot duty, under orders to arrest all passers-by carrying concealed weapons, arrested the plaintiff who had a pistol in his buggy. The plaintiff sued for false imprisonment. *Held*, that he may recover. *Franks* v. *Smith*, 134 S. W. 484 (Ky.). See NOTES, p. 656.

MINES AND MINERALS — LOCATION OF CLAIMS — EXCESSIVE LOCATION. — In locating a mining claim the defendant marked the boundaries of the side lines within three hundred feet of the supposed course of the center of the vein. Part of the ground so located proved to be more than three hundred feet from the true course of the vein. *Held*, that such part of the location is not excessive as against the claims of subsequent locators. *Harper* v. *Hill*, 113 Pac. 162 (Cal., Sup. Ct.).

The statute provides that a mining claim shall not exceed in width three hundred feet on each side of the middle of the vein at the surface. U. S. REV. STAT., 1878, § 2320. On the theory that the right to the surface continued, as under the prior act of 1866, to be incidental and dependent upon the right to the vein, it has been held that if a vein unexpectedly terminates before reaching an end line, the location beyond that point is void. *Patterson* v. *Hitchcock*, 3 Colo. 533. So also, in a case like the present, any ground proving to be more than three hundred feet from the vein has been held to be excess, though the location has not exceeded six hundred feet in width. *Southern California Ry. Co.* v. *O'Donnell*, 2 Cal. App. 499. Such a strict construction of the statute has been justly criticized, because it makes all locations "floating" until the exact course of the vein is ascertained, and because the acquisi-

tion of extralateral rights may be prevented by the departure of the vein through a side line; since the drawing in of the boundaries might prevent the end lines from being parallel. COSTIGAN, MINING LAW, § 55 a (2). In reaching an opposite result the principal case is supported by one other case. *Watervale Mining Co.* v. *Leach*, 4 Ariz. 34.

PARTNERSHIP — RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS INTER SE — ACCOUNTING FOR PROCEEDS OF ILLEGAL PARTNERSHIP. — The plaintiff, a married woman, cohabited with the defendant, a bachelor, under a partnership agreement to prove up a homestead in the defendant's name. They did so, sold the homestead, and part of the proceeds were invested in other land by the defendant under a subsequent agreement with the plaintiff. *Held*, that, since the illegal transaction was completed, the plaintiff is entitled to an accounting. *Mitchell* v. *Fish*, 134 S. W. 940 (Ark.).

When partners are engaged in a transaction contrary to public policy, courts will not aid one against the other, but will leave them where they are. *Snell* v. *Dwight*, 120 Mass. 9; *Jackson* v. *Executors of McLean*, 100 Mo. 130. But a transaction independent of the illegal business is valid. *Guilfoil* v. *Arthur*, 158 Ill. 600. Just how far collateral the transaction must be, that it may not be tainted by the original illegality, is a matter of much controversy. Some courts have decreed an accounting when the illegal business was completed, on the ground that the origin of the fund would not be investigated. *Planters' Bank* v. *Union Bank*, 16 Wall. (U. S.) 483. *Contra*, *Craft* v. *McConoughy*, 79 Ill. 346. Other courts will enforce a subsequent contract to divide the proceeds of the illegal transaction. *De Leon* v. *Trevino*, 49 Tex. 88. Many courts decree an accounting where the proceeds of the illegal venture have been reinvested. *Brooks* v. *Martin*, 2 Wall. (U. S.) 70. The test often suggested is whether the plaintiff must rely on the illegal transaction in order to maintain his case. *Woodward* v. *Bennett*, 43 N. Y. 273. See PAGE, CONTRACTS, § 527. Undoubtedly, also, the degree of illegality must be considered. Though the authorities are abundant establishing these exceptions to the general rule against aiding a party to an illegal transaction, there seem to be strong considerations against them, for their effect is that the illegal agreements actually are carried out. See *McMullen* v. *Hoffman*, 174 U. S. 639.

POWERS — GENERAL POWERS OVER PERSONALTY: WHAT LAW GOVERNS APPOINTMENT BY FOREIGN WILL. — The donee of an English power was domiciled in Holland. By the laws of Holland no person may dispose by will of over seven-eighths of his property, the devolution of the residue being prescribed by law. By a will executed in accordance with all the formal requisites of both countries, she left to her husband "all the property which the law would allow her to dispose of." *Held*, that the husband took the entire property subject to the power, not merely seven-eighths. *Re Pryce*, 130 L. T. 415, (Eng., Ch. D., Feb. 20, 1911). See NOTES, p. 654.

PUBLIC OFFICERS — COMPENSATION — RIGHTS OF DE FACTO OFFICERS. — During 1910 the plaintiff served as city marshal. His title to office, however, was invalid, for he had not been appointed in the manner prescribed by statute. He, nevertheless, performed all the duties of marshal and then sued for the salary. This he claimed was due him as *de facto* marshal, for no *de jure* officer had been appointed. *Held*, that he may recover the full salary. *Peterson* v. *Benson*, 112 Pac. 801 (Utah). See NOTES, p. 658.

RAILROADS — REGULATION OF RATES — POWERS OF THE STATES. — The state of Minnesota passed acts reducing intrastate freight rates from 7 to 25 per cent, and intrastate passenger rates 33⅓ per cent, the new rates allowing

less than $3\frac{1}{2}$ per cent return on the capital invested. The stockholders of various railroads sued to enjoin the railroads and the state railroad commission from keeping the prescribed rates in force. *Held*, that, as the new rates are confiscatory and impose a burden on interstate commerce, an injunction should be granted. *Shepard* v. *Northern Pacific Ry. Co.*, 184 Fed. 765 (Circ. Ct., D. Minn.).

The limits of state control over intrastate commerce are hard to define. The states can tax foreign corporations for the privilege of engaging in intrastate commerce. *Pullman Co.* v. *Adams*, 189 U. S. 420; *Allen* v. *Pullman's Palace Car Co.*, 191 U. S. 171. But they cannot base that tax on the property of the corporations outside of the state, as that would burden interstate commerce. *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1. Under the exercise of their police power they can make and enforce regulations affecting interstate commerce. *Reid* v. *Colorado*, 187 U. S. 137. But these regulations must be reasonable. *Houston & Texas Central R. Co.* v. *Mayes*, 201 U. S. 321, 328. The decision of the principal case has greatly limited their power to regulate intrastate railroad rates. The master's report found that the results of the new rates must be either an unjust discrimination in favor of the Minnesota cities near the state line, and against cities that are just outside it, or a far-reaching readjustment of interstate rates, and that the railroads are practically forced to the latter. Thus a state's power to make any general reduction of rates is cut down, for a very slight reduction might produce such results.

RESTRAINT OF TRADE — MONOPOLY — CONTRACTS TO SELL AT FIXED PRICE. — The plaintiff manufactured proprietary medicines which it sold only under an extensive system of contracts with wholesale and retail druggists. The wholesalers, under contracts which purported to make them agents, agreed to resell only to designated retailers at fixed prices. The designated retailers bound themselves to maintain the prices set by the plaintiff. *Held*, that the system of contracts is invalid as in restraint of trade. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 31 Sup. Ct. Rep. 376.

This case probably settles the law on an important and comparatively new question. A single contract between manufacturer and dealer restricting the price of resale has been held valid as a not unreasonable restraint of trade. *Garst* v. *Harris*, 177 Mass. 72. But contracts between competing dealers fixing prices are invalid as tending toward monopoly. *Craft* v. *McConoughy*, 79 Ill. 346. The mooted question is, — shall the system of contracts between the manufacturer and the many competing dealers, quite as effectively restricting competition between the dealers, fare any better? The majority of the court feel that public policy requires a negative answer. The manufacturer need not sell at all, he may sell at what prices he will, but having sold, he has no right further to control prices by such "agreements restricting the freedom of trade on the part of dealers who own what they sell." The public is entitled to the benefit of this competition. The view of the dissenting opinion is that "the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear." For a criticism of a similar case, see 24 HARV. L. REV. 244.

RIGHT OF PRIVACY — NATURE AND EXTENT OF RIGHT. — The defendant merchants published a picture of the plaintiff without his consent in a newspaper advertisement. *Held*, that the plaintiff can recover for the invasion of his right of privacy. *Munden* v. *Harris*, 134 S. W. 1076 (Mo., Kansas City Ct. App.).

The plaintiff had judgment in an action to restrain the unauthorized use of his name or portrait for the purposes of trade by the defendant, and to recover damages for such use. The conditions requisite for an appeal in a personal injury

suit were not complied with. *Held*, that no appeal lies. *Riddle* v. *McFadden*, 94 N. E. 644 (N. Y.).

The weight of authority in the United States now recognizes the right of privacy without the aid of statute, both by granting injunctions restraining violations of the right and entertaining actions for damages for such violations. *Pavesich* v. *New England Life Ins. Co.*, 122 Ga. 190; *Edison* v. *Edison Polyform Mfg. Co.*, 73 N. J. Eq. 136. See *Foster-Milburn Co.* v. *Chinn*, 134 Ky. 424, 432. *Contra*, *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538; *Henry* v. *Cherry*, 30 R. I. 13; *Corelli* v. *Wall*, 22 T. L. Rep. 532. See *Atkinson* v. *Doherty & Co.*, 121 Mich. 372. The subject was first brought into prominence in an article in 4 HARV. L. REV. 193. Whether the right of privacy is a personal or a property right is still a matter of conflict of opinion. Immediately after the New York decision above cited, a statute was passed to prevent the unauthorized use of the name or picture of any person for the purposes of trade. N. Y. LAWS OF 1903, c. 132. The latter of the principal cases holds the right of privacy thus created to be a personal right. The former regards the right of privacy as a property right.

SEARCHES AND SEIZURES — SEIZURE OF INCRIMINATING EVIDENCE AT TIME OF PRISONER'S ARREST. — At the time of the arrest of the defendants under a warrant, certain books and papers in their possession, containing incriminating evidence, were seized without a warrant. The defendants brought a petition for the return of all the papers before the trial. *Held*, that the petition be granted. *United States* v. *Mills*, 185 Fed. 318 (Circ. Ct. S. D. N. Y.). See NOTES, p. 661.

STATUTE OF FRAUDS — INTEREST IN LANDS — CONTRACT SIGNED BY VENDOR ONLY. — The plaintiff entered into a written contract for the purchase of land, and assigned his interest to the defendant in writing. The defendant signed no writing. *Held*, that the plaintiff may recover the consideration for the assignment. *Evans* v. *Stratton*, 134 S. W. 1154 (Ky.).

The common form of the Statute of Frauds, which is in force in Kentucky, requires the contract for the sale of real estate, or some note thereof, to be signed by the party to be charged. RUSSELL, STATS. OF KY., 1909, § 1775. Many authorities, however, hold that the contract is enforceable against the buyer if signed by the seller alone. Resort is had to curious reasoning to support this proposition. It is urged that the object of the statute was only to protect owners of real estate from being deprived of it without written evidence. *Gardels* v. *Kloke*, 36 Neb. 493. But the danger is as great that a purchase at an exorbitant price may be imposed on the other party. See *Simms* v. *Killian*, 12 Ired. (N. C.) 252, 253. Another line of reasoning is based on the antiquated notion that the buyer's promise is only to pay money and is quite independent of the seller's undertaking to sell land. *Lewis* v. *Grimes*, 7 J. J. Marsh. (Ky.) 336. Probably, too, the old dislike of the Statute of Frauds has influenced some courts. The practically uniform rule, however, excepting cases of partial performance in equity, is that the contract can be enforced only against the party who has signed. *Capehart* v. *Hale*, 6 W. Va. 547; *Love* v. *Atkinson*, 131 N. C. 544.

SURVIVORSHIP — PROOF IN CASE OF DEATH BY COMMON DISASTER. — The beneficiary in a life insurance policy perished with the insured in a common disaster. The policy provided that if the beneficiary died before the insured, the proceeds of the policy should go to the legal representatives of the insured. *Held*, that the estate of the insured is entitled to the amount of the policy. *Dunn* v. *New Amsterdam Casualty Co.*, 141 N. Y. App. Div. 478.

For a discussion of the principles involved, see 16 HARV. L. REV. 368.

TAXATION — PARTICULAR FORMS OF TAXATION — INHERITANCE TAX ON PROPERTY EMBEZZLED BY EXECUTOR. — An executor embezzled large sums from the estate, and the state charged the residuary legatees with an inheritance tax on these funds. *Held*, that the tax is properly laid. *In re Hite's Estate*, 113 Pac. 1072 (Cal., Sup. Ct.).

Since an inheritance tax is a tax on the right of succession and not on property, it should be determined when title vests in the distributee and not when he is given possession. *Matter of Sloane*, 154 N. Y. 109; *Estate of Woodard*, 153 Cal. 39. This, it is universally agreed, is at the testator's death, for it is then that the legatee's beneficial interest accrues. *Mechanics' Savings Bank* v. *Waite*, 150 Mass. 234; *Matter of Davis*, 149 N. Y. 539. Accordingly, appreciations or depreciations subsequent to the testator's death do not affect the amount of the tax. *Hooper* v. *Bradford*, 178 Mass. 95. But a legatee is never beneficially interested in sums which must be paid for lawful debts of the estate or reasonable expenses of administration, as in no manner can he receive these. They are, therefore, deducted from the value of the estate in determining the tax. *In re Estate of Graves*, 242 Ill. 212. But this deduction is limited to lawful debts and reasonable expenses of administration. *Matter of Liss*, 39 N. Y. Misc. 123; *Matter of Havemeyer*, 32 N. Y. Misc. 416. In the principal case, the legatees were beneficially interested in the embezzled funds, so this misconduct of the executor should no more affect the rights of the state than would an improper expenditure of the funds for the estate.

TRANSFER OF STOCK — REFUSAL BY CORPORATION TO PAY TRANSFEREE BECAUSE OF TRANSFEROR'S INDEBTEDNESS. — The certificates of stock of the defendant bank provided that it was transferable only on the books of the bank. A stockholder assigned a certificate to the plaintiff without notice to the bank, and subsequently the defendant lent to the transferor. Because of this debt, the defendant refused to pay the plaintiff certain sums due to stockholders. *Held*, that the defendant must pay. *Union Bank of Brooklyn* v. *United States Exchange Bank*, 127 N. Y. Supp. 661 (App. Div.).

The effect which provisions requiring registration of stock transfers in the books of a corporation have on the rights of the transferee and subsequent creditors of the transferor has been the subject of considerable conflict, but the better view protects the transferee. *Continental Nat. Bank* v. *Eliot Nat. Bank*, 7 Fed. 369. *Contra*, *Buttrick* v. *Nashua & Lowell Railroad*, 62 N. H. 413. See 16 HARV. L. REV. 312. On principle this provision in a charter or certificate should affect only the rights of the corporation and its stockholders *inter se*. *Mount Holly, etc., Co.* v. *Ferree*, 17 N. J. Eq. 117. The question is then raised as to what must be stipulated in the charter or certificate and what rights of the corporation will be protected. It is clear that if it is provided that no transfer is valid unless registered and the transferor's debts paid, the corporation will be protected as to all debts incurred prior to notice of the transfer. *Union Bank* v. *Laird*, 2 Wheat. (U. S.) 390; *Rogers* v. *Huntingdon Bank*, 12 Serg. & R. (Pa.) 77. But in the principal case, the only provision was for registration, and in the absence of express statements, the common-law rule giving no lien to a corporation on its stock for debts due from its stockholders should be followed. *Bank of Holly Springs* v. *Pinson*, 58 Miss. 421. The effect of this provision should be limited to protecting the corporation for paying dividends to stockholders of record or allowing them to vote. *State ex rel. White* v. *Ferris*, 42 Conn. 560; *Smith* v. *American Coal Co.*, 7 Lans. (N. Y.) 317.

BOOK REVIEWS.

TRICHOTOMY IN ROMAN LAW. By Henry Goudy, D.C.L., Regius Professor of Civil Law in the University of Oxford. Oxford: The Clarendon Press. 1910. pp. 77.

Hegel commended the Roman jurists for their frequent employment of trichotomies, which, he conceived, showed their logical power. But these three-fold divisions, in which the Roman books abound, have given great trouble to commentators and to modern jurists. Professor Goudy holds that the ingenuity which has been expended upon such trichotomies as the three precepts of the opening title of the Institutes, the triple division of the sources of Roman Law, the classification of private law into persons, things, and actions, the three kinds of possessory interdicts, and the words of the formulas, *dare*, *facere*, *praestare*, has been wasted, in that three-fold divisions were devised for their own sake and the law was forced into them as well as might be. He finds in Roman jurists, especially Ulpian, a "persistent tendency to trichotomy," even at the expense of accuracy, completeness and logic, and explains this tendency by the symbolism of numbers and the significance of the number three, as symbolic of completeness, to which the ancients attributed so much importance in other connections. This mystic importance of the number three, he shows, appears in the law in two ways: First, it survived from the old law in provisions of the Twelve Tables (*e. g.* the three sales of a son in *potestas*, the *trinoctium*, the proclamation on three market-days), in old formulas (*e. g. do*, *dico*, *addico*) and in maxims (*e. g. tres faciunt collegium*); second, it was impressed upon the classical jurists, chiefly Ulpian, by their reading of Stoic philosophers. "It is not too much," he tells us, "to say that wherever Ulpian gives a classification of an institution or doctrine into genera and species, we may expect to find it tripartite if the subject matter admits of it or may be forced into it." The twenty-eight three-fold divisions or classifications which are discussed critically go far to confirm this thesis.

Hofmann had pointed out already that symbolism of numbers plays a controlling part in the arrangement of the Digest. Sokolowski had shown how Stoic notions as to "essence" and "appearance" and "species" had influenced many texts otherwise inexplicable. Professor Goudy in a prior study (unhappily not generally available) had made a strong case for holding that the quadripartite division, subdivision and resubdivisions of obligations, so remarkable in the Institutes, must be attributed to symbolistic ideas. Add to these the present exposition of the tripartite classifications, and it must be confessed the theory is very plausible. Certainly it causes many difficulties which have puzzled jurists to disappear. Perhaps a stronger case is made, however, with respect to the trichotomies in classification, which are as a rule very artificial and often palpably faulty, than with respect to the traditional triads. Obviously the New York Code of Civil Procedure was not made under the influence of any ideas of number symbolism. Yet there are 63 three-fold groupings in that act, and if we eliminate four-fold groupings, which are next in frequency, there are not many left. As Lewis Carroll puts it, three is a "convenient number to state." It is plural and yet not too large, and suggests itself naturally. Witness three days of grace, three callings of a party in default, the *oyez*, *oyez*, *oyez* of the crier, the common statutory period of three days in which to move for a new trial, the common provision for three peremptory challenges, and the like.

An example may illustrate how cautious we should be in attributing too much to a conscious desire to make triads. Suppose a future historian were expounding the institutions of to-day along similar lines. He would begin

with the symbolism of numbers as set forth by Mackey or Albert Pike and would show the great importance attributed to the number three. He would observe that King Edward VII was an eminent Mason and that from the beginning the highest offices among English Masons have been held by noblemen. He would point out that George Washington was the master of a masonic lodge, and that the leaders of the American Revolution and American constitution makers, statesmen, judges and generals were largely Masons. Hence he would conclude the symbolic value of three, as expounded by masonic authors, was a fundamental tenet of intelligent Anglo-Americans in public life in the eighteenth and nineteenth centuries. Looking at British institutions from this point of view, he would find much to confirm his theory. He would find three kingdoms, arbitrarily excluding Wales. He would find sovereignty reposed, in theory, in King, Lords and Commons, and he would point out the long persistence of a useless House of Lords. He would refer to the three superior courts of common law, all with the same jurisdiction. After the Judicature Act, he would find three courts, the County Court, the Supreme Court of Judicature and the House of Lords, and he would remind his readers that the appellate jurisdiction of the House of Lords was restored after the original act had done away with it, and was regarded by eminent authorities as seriously impairing the judicial organization. He would find that the High Court was arranged in three divisions, that there were three judges in each department of the Court of Appeal, that High Court, Court of Appeal and House of Lords formed another trinity and that there were three heads of the judicial system, Chancellor, Chief Justice and Master of the Rolls. In American institutions, he would see the government divided into executive, legislative and judicial departments and would find the courts struggling to maintain an impossible analytical distinction along historical lines in the face of practical difficulties and at the expense of much useful legislation. He would show that the Judiciary Act provided for three federal courts and that when in 1891 a fourth was added, this impairment of the tripartite arrangement was so repugnant to American ideas of symbolism that the Circuit Court was abolished within ten years. All bills were read three times before passage, and many State constitutions expressly required this form, which was considered so sacred that statutes were declared void because it had not been complied with. Even in so practical a matter as military organization and tactics, he would say, the Americans insisted on the mystic number three. Their organization was a trinity of trinities: squads, sections, platoons; companies, battalions, regiments; brigades, divisions, corps. The Drill Regulations prescribed a regiment of three battalions, a brigade of three regiments, a division of three brigades, a corps of three divisions. Nay, the theoretical writers on tactics insisted that the correct battle-order was a formation in three lines, and this was the regular practice of the Duke of Wellington, who, we know, was a Mason! The American national game was built around the number three. There were thrice three players and thrice three innings, three bases, three outfielders, three out made an inning and the batter was allowed three strikes. The law, he would then point out, was permeated with this number three. The institutional books said that property was real, personal and mixed; that actions were real, personal and mixed; that crimes were treasons, felonies and misdemeanors; that the jurisdiction of equity was exclusive, concurrent and auxiliary; that freeholds were conveyed by feoffment and livery, fine or recovery; that a use might be raised by feoffment to uses, bargain and sale, or covenant to stand seised; that there were contracts of record, specialties, and simple contracts, estoppels by record, by deed and *in pais*, and privity of contract, of estate, and of blood. He would have no trouble in showing that many of these were arbitrary and illogical and that most of them were inadequate. Trusts were said to be express, resulting or constructive, although the last two went on the same essential principle; in

equity pleading, there were bill, answer and replication, although the latter was the merest form; a defendant in equity might demur, plead or answer, and yet all three functions were performed by answer alone; most of the codes of procedure provided for complaint, answer and reply. And so on indefinitely. This might appear a very strong case. And yet it cannot be that regard for the number three as a symbol has had anything to do with the matter or that those who drew our codes and practice acts had ever heard of such a thing.

Yet, conceding, as one must, that such speculations as Professor Goudy's may lead us too far, one must concede also that he has called attention to a point of capital importance in connection with many distinctions and classifications upon which juristic ingenuity has thus far made no impression commensurate with the time and ability brought to bear upon them. No one who has to do with the classifications of the Roman jurists in the future can afford to overlook the element of number symbolism. R. P.

THE CONSTITUTION OF THE UNITED STATES. By David K. Watson. Chicago: Callaghan & Co. 1910. In two volumes. pp. xxxiii, ix, 1959.

This work deals with the Constitution in a way that will be appreciated by any one interested either in the origin of the instrument or in the mode by which the courts have applied it to the various emergencies arising since it was framed. The historical introduction begins with the meeting in 1774 of the First Continental Congress and ends with the assembling of the Federal Constitutional Convention in 1787, giving in eighty-eight pages an account of the forces leading to a more perfect union, and also a description of the members of the Federal Constitutional Convention. Then follows the main part of the work. The plan adopted is to deal with constitutional questions in the order in which the topics arise in the Constitution itself, and to deal with each question in an historical fashion, giving, among other things, such light as is thrown upon each topic by the Articles of Confederation, the proceedings of the Federal Constitutional Convention and of the several state conventions, contemporaneous letters, later letters and speeches, and the decisions of the courts. Throughout there is ample quotation from the Journal of the Federal Constitutional Convention, Elliot's Debates, judicial opinions, and other sources. The result is a piece of work which does not duplicate any of the other treatises, but which in a useful manner supplements each of them. The time has gone by when all that is to be said as to the Constitution can be embodied in only two volumes. Consequently the plan of this work necessarily excludes an attempt to cite all the decisions and also an attempt to present in the author's own words an idealized theory of the several topics. The author is well within his rights in thus limiting his plan; for citations can be gathered easily enough from digests and the like, and discussions can be found in many specialized treatises. After setting his limits, the author has worked within those limits with obvious diligence and with as much accuracy as can be expected in a presentation of so much material. The inevitable slips appear to be unimportant. On page 38 there is clearly something wrong with the chronology. On page 785 it is erroneously said that in *Dartmouth College* v. *Woodward* "The plaintiff was successful in all the courts of New Hampshire." On page 791 it is said that in *Ogden* v. *Saunders* bills of exchange had been endorsed to Ogden, whereas in truth they had been drawn on him and had been accepted. Such minute and immaterial errors cannot cause any fair-minded reader to question the author's accuracy. Indeed it has already been said that the author's diligence is obvious. The result is a work worthy to be placed beside the other general treatises on this vast and increasingly important subject.

NEGOTIABLE INSTRUMENTS LAW, ANNOTATED, Second Edition. By Joseph D. Brannan, Bussey Professor of Law in Harvard University. Cincinnati: W. H. Anderson Company. 1911. pp. xxxiv, 330.

Nothing but good can be said by the reviewer of this book. It has been entirely rearranged since the first edition, and the numerous decisions on the Negotiable Instruments Law, since that edition was published, give material for considerable additions. As the book is now arranged, under each section of the law the searcher finds an exhaustive collection of the pertinent cases decided by the courts; a statement of the slight differences that not infrequently exist between the laws of the several states which have passed the uniform law; the acute criticisms of Professor Ames, Judge Brewster, and Mr. McKeehan, extracted from the articles in which they originally appeared; and a comparison of the corresponding section of the English statute. Not only American decisions but also the English cases are collected. As the English statute is, in many respects, similar to the American, these cases are often very important. The feature of the book that perhaps is the most valuable is the digesting of the most important cases cited. The author states exactly the facts and the points decided in each case digested, and does not take the easy and common substitute of merely quoting remarks extracted from the opinion of the court. His own occasional comments on the decisions, always acute and instructive, greatly add to their value.

The articles of Professor Ames, Judge Brewster and Mr. McKeehan, as well as a letter of Mr. Arthur Cohen, of the English Bar, are reprinted after the annotated act. Comparative tables of the corresponding sections of the English Bills of Exchange Act and the Negotiable Instruments Law are added. In every way the book is a most convenient summary of legal decisions and criticism of the Negotiable Instruments Law.

It is no disparagement of the work to add that it is not a treatise on the law of negotiable instruments. It does not purport to be. It rather assumes a preliminary knowledge of the subject. While no fault can be found with the author for not enlarging the scope of his work, the hope may nevertheless be expressed that we may have before long a full and scientific treatise on the law of negotiable instruments. The larger treatises on the subject, whatever their original merit, are now somewhat antiquated and the smaller books of recent years are too summary and incomplete in their treatment to be satisfactory.

S. W.

SUPPLEMENT TO A TREATISE ON THE INTERSTATE COMMERCE ACT AND DIGEST OF DECISIONS CONSTRUING THE SAME. By Henry S. Drinker, Jr. Philadelphia: George T. Bisel Co. 1910. 8vo, pp. 735.

This volume is in the strictest sense a supplement to the two volumes previously published by Mr. Drinker. Those two volumes were so useful that it is a satisfaction to have an addition to them. The present volume contains a full text of the Act to Regulate Commerce, as amended by the Mann-Elkins Law of June 18, 1910, and by previous amendments, which is printed with side notes and foot notes indicating and explaining the changes made by the Mann-Elkins Law. In Part I, "The Substantive Requirements of the Act," and Part II, "The Enforcement of the Act," the various sections of the original volumes are brought down to date.

A large part of the present volume is taken up with digests of recent decisions in interstate commerce cases by the Interstate Commerce Commission, lower federal courts and the United States Supreme Court. The digests are well made and are kept within convenient compass. Appendix A contains annotations to Commission citations; Appendix B a table of commodity rates passed upon in recent cases. There is a table of the cases cited in the sup-

plement and an excellent index covering both the original treatise and the supplement.

It is to be regretted that the large number of decisions in interstate commerce cases, and the exigencies of publishers, made it necessary for this volume to be published before it was possible to know the effect of the amendments made by the Mann-Elkins Law in actual operation, but presumably Mr. Drinker will add to his book at a later time. Its value to attorneys handling interstate commerce cases would justify him in doing so. S. H. E. F.

WILLIS AND OLIVER'S ROMAN LAW EXAMINATION GUIDE FOR BAR AND UNIVERSITY (Questions and Answers). Third Edition, partly rewritten. By David T. Oliver, LL.M., of Trinity Hall, Cambridge, Barrister at Law, and W. Nalder Williams, M.A., LL.B., Lecturer at Selwyn College and formerly Scholar of Trinity College, Cambridge. London: Butterworth & Co. 1910. pp. x, 385, 21 (index).

Americans will be interested in this book chiefly as an indication of the sort of examination in Roman law which is exacted of candidates for the Bar in England. It is intended for students preparing for English examinations only, and is made up from questions set in actual examinations. One must not expect too much under such circumstances, and, considering the necessary limitations, the work seems to have been done well — certainly much more thoroughly and critically than is usual in such books. A student who had read carefully might well find here a useful review. But American examinations in Roman law are not of such a character as to make a book of this kind expedient, and for other uses than preparation for examination it would not be worth while. R. P.

A TREATISE ON FEDERAL CRIMINAL LAW PROCEDURE WITH FORMS OF INDICTMENT. By William H. Atwell. Chicago: T. H. Flood and Company. 1911. pp. 19, 452.

BURGE'S COMMENTARIES ON COLONIAL AND FOREIGN LAWS. In six volumes. Edited by Alexander Wood Renton and George Grenville Phillimore. London: Sweet and Maxwell, Ltd.; Stevens and Sons, Ltd. 1910. xxxviii, 420; xliv, 629; xlix, 987.

INTRODUCTION TO THE SCIENCE OF LAW. Systematic Survey of the Law and Principles of Legal Study. By Karl Gareis. Translated by Albert Kocourek. Boston: The Boston Book Company. 1911. pp. xxix, 375.

THE RECORDS OF THE FEDERAL CONVENTION OF 1787. In three volumes. Edited by Max Farrand. New Haven: Yale University Press. London: Henry Frowde. Oxford University Press. 1911. pp. xxv, 606, 667, 685.

A TREATISE ON STATUTE LAW. By William Fielden Craies. Second Edition. London: Stevens and Haynes. 1911. pp. ci, 725.

REPORT OF THE COMMISSIONER OF EDUCATION FOR THE YEAR ENDING JUNE 30, 1910. Volume II. Washington: Government Printing Office. 1911. pp. xxvi, 663–1373.

MANUAL OF POLITICAL ETHICS. By Francis Lieber. In two volumes. Second Edition. Edited by Theodore D. Woolsey. Philadelphia and London: J. B. Lippincott Company. 1911. pp. 472, 459.

ANCIENT, CURIOUS AND FAMOUS WILLS. By Virgil M. Harris. Boston: Little, Brown and Company. 1911. pp. xiii, 472.

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